Eligibility for Brownfields Funding

September 2002,

Introduction

President George W. Bush signed, the Small Business Liability Relief and Brownfields Revitalization *Act* into law on January 11, 2002. The Brownfields Law expands potential federal financial assistance for brownfield revitalization, including grants for assessment, cleanup, and job training. The new law also limits the liability of certain contiguous property owners and prospective purchasers of brownfield properties, and clarifies innocent landowner defenses to encourage revitalization and reuse of brownfield sites. The Brownfields Law also includes provisions to establish and enhance state and tribal response programs, which will continue to play a critical role in the successful cleanup and revitalization of brownfields.

This summary highlights the eligibility requirements of the new law.

Type of Grant	Eligible Entities
Brownfields *assessment grants*	"Eligible entities" as defined in the new Brownfields Law
Brownfields *revolving loan fund grants*	"Eligible entities" as defined in the new Brownfields Law
Brownfields *direct cleanup grants*	*and Nonprofit Organizations* (note: EPA will use the definition of nonprofit organizations contained in Section 4(6) of the Federal Financial Assistance Management Improvement Act of 1999, Public Law 106-107)
To be used only for the remediation of properties owned by the eligible party	

Eligible Entities and Properties under the New Law

There are two aspects to brownfields funding eligibility:

1) Eligible Entities
(who can receive a brownfields grant)

2) Eligible Properties
(which properties are eligible for funding).

Parties eligible for brownfields grants include:

The new Brownfields Law defines "Eligible Entities"

- General purpose unit of local government (note: for purposes of the brownfields grant program, EPA defines general purpose unit of local government as a "local government" as that term is defined under 40 CFR Part 31)
- Land clearance authority or other quasi-governmental entity that operates under the supervision and control of or as an agent of a general purpose unit of localgovernment
- Government entity created by a state legislature
- Regional council or group of general purpose units of local government
- Redevelopment agency that is chartered or otherwise sanctioned by a state
- StateIndian tribe other than in Alaska (note: intertribal Consortia are eligible for funding in accordance with EPA's policy for funding intertribal consortia)
- Alaska native Regional Corporation and an Alaska Native Village Corporation and the Metlakatla Indian community

Under the new Brownfields Law, Eligible Properties include:

- Properties that meet the definition of a Brownfield Site under the new Brownfields Law

- Properties for which EPA has made a property-specific funding determination, based upon the criteria provided in the new Brownfields Law.

The new Brownfields Law defines a *"Brownfield Site"* to mean: "...real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." Brownfield sites include residential, as well as commercial and industrial properties.

Property-Specific Determinations of Eligibility

Property-Specific Determinations: The Brownfields Law excludes certain types of property from funding eligibility, *unless EPA makes a property-specific funding determination*:

- Facilities subject to planned or ongoing CERCLA removal actions.
- Facilities that are subject to unilateral administrative orders, court orders, administrative orders on consent or judicial consent decree or to which a permit has been issued by the United States or an authorized state under the Solid Waste Disposal Act (as amended by the Resource Conservation and Recovery Act (RCRA)), the Federal Water Pollution Control Act (FWPCA), the Toxic Substances Control Act (TSCA), or the Safe Drinking Water Act (SDWA).
- Facilities subject to corrective action orders under RCRA (sections 3004(u) or 3008(h)) and to which a corrective action permit or order has been issued or modified to require the implementation of corrective measures.

- Land disposal units that have filed a closure notification under subtitle C of RCRA and to which closure requirements have been specified in a closure plan or permit.
- Facilities where there has been a release of polychlorinated biphenyls (PCBs) and are subject to remediation under TSCA.
- Portions of facilities for which funding for remediation has been obtained from the Leaking Underground Storage Tank (LUST) Trust Fund.

Criteria for Property Specific Funding Determinations:

The new legislation allows EPA to award financial assistance *to an eligible entity* for assessment or clean up activities at the site, if it is found that financial assistance will:

1. Protect human health and the environment, **and**
2. Either:
   promote economic development; or
   enable the creation of, preservation of, or addition to parks, green ways, undeveloped property, other recreational property, or other property used for nonprofit purposes.

- Facilities subject to unilateral administrative orders, court orders, administrative orders on consent or judicial consent decree issued to or entered into by parties under CERCLA.
- Facilities that are subject to the jurisdiction, custody or control of the United States government.

Facilities *not* Eligible for Brownfields Funding:

- Facilities listed (or proposed for listing) on the National Priorities List (NPL).

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Summary of Brownfields Grants Guidelines

September 2002

President George W. Bush signed, the Small Business Liability Relief and Brownfields Revitalization Act into law. on January 11, 2002. The Brownfields Law expands potential federal financial assistance for brownfield revitalization, including grants for assessment, cleanup, and job training. The new law also limits the liability of certain contiguous property owners and prospective purchasers of brownfield properties, and clarifies innocent landowner defenses to encourage revitalization and reuse of brownfield sites. The Brownfields Law also includes provisions to establish and enhance state and tribal response programs, which will continue to play a critical role in the successful cleanup and revitalization of brownfields.

This summary highlights the new grant guidelines and select provisions of the new law relevant to applicants.

Fiscal Year 2003 Grant Guideline Highlights

The FY03 Brownfields Grant Guideline is a document that provides applicants with information on requirements for applying for three types of Brownfields grants: assessment grants, revolving loan fund (RLF) grants, and, new in FY03, direct cleanup grants. These grants are authorized under Subtitle A of the new Brownfields law to promote the cleanup and redevelopment of brownfields by providing financial assistance for revitalization efforts. Job training grant guidelines and Grant Funding Guidance for State and Tribal Response programs under Subtitle C of the Brownfields law are being published separately.

The FY03 Brownfields grant guidelines reflect a new approach. The proposal process has also been streamlined to allow applicants to prepare an initial proposal for funding under three different types of grants: assessment, RLF anddirect cleanup. EPA will review the applicants' Initial Proposals, and, after ranking, will invite a subset of these applicants to submit to EPA their final proposals.

Eligible Entities

A wide range of governmental entities are eligible for assessment, RLF and direct cleanup grants. Eligible governmental entities include states, tribes, local governments, councils of government, and state chartered redevelopment agencies.

In addition, the new Brownfields law provides two new ways in which non profit organizations may receive funding to clean up *sites that they own*. Non profit organizations may apply directly to EPA for cleanup grants for sites that they own, In addition, governmental RLF grant recipients may use their funding to award cleanup subgrants to other eligible entities, which now includes certain non profit organizations. Cleanup grants and RLF subgrants, unlike RLF loans, do not need to be repaid.

Grant Funding Amounts

Eligible governmental entities may apply for up $400,000 in assessment funding–up to $200,000 of which has to be used to address sites contaminated by hazardous substances, pollutants or contaminants, and up to $200,000 of which has to be used to address sites contaminated by petroleum. Applicants may request a waiver of the $200,000 site limits up to a $350,000 site limit, based on the anticipated level of

contamination, size, or status of ownership. Due to budget limitations, no entity may apply for funding assessment activities in excess of $700,000.

Eligible governmental entities may apply for up to $1 million for an initial RLF grant. Coalitions–groups of eligible entities–may apply together under one grant recipient for up to $1 million per eligible entity. Revolving loan funds generally are used to provide no-interest or lower-interest loans for brownfields cleanups. The new Brownfields law requires the applicant to contribute a 20 percent cost sharing for RLF awards; this cost share may be in the form of money or, labor, material or services that would be eligible and allowable costs under the RLF grant. Applicants may requests waivers of the cost share requirements based on hardship, as described in the guideline.

Eligible governmental entities may apply for up to $200,000 per site for cleanup grants for sites they own. Due to budget limitations, no entity should apply for cleanup grants at more than five sites. Cleanup grants also require the applicant to contribute a 20 percent cost sharing for cleanup grant awards; this cost share may be in the form of money, labor, material or services that would be eligible and allowable costs under the cleanup grant.. Applicants may requests waivers of the cost share requirements based on hardship, as described in the guideline.

Grant Application Schedule and Details

Initial Proposals must be postmarked or sent via registered or tracked mail to the appropriate Regional representative by November 27, 2002 with a copy to Headquarters.

Applicants are encouraged to work with their EPA Regional Brownfields Contacts in the preparation of their Initial Proposals.

CERCLA Liability and the Small Business Liability Relief and Brownfields Revitalization Act

September 2002

Title I - Small Business Liability Protection

The new Brownfields Law provides liability protection for certain businesses and municipal waste contributors to NPL sites:

- CERCLA liability exemption for certain small volume waste contributors to NPL sites (i.e., contributors of less than 110 gallons or 200 pounds), if waste has not contributed significantly to cost of response action.
- CERCLA liability exemption for certain contributors of municipal solid waste (MSW)(e.g., certain residential property owners, small businesses, non-profits), if MSW has not contributed significantly to cost of response action
- Shifts court costs and attorneys fees to a private party if a private party loses a Superfund contribution action against de micromis or municipal solid waste exempt party.

EPA anticipates issuing guidance related to the de micromis and MSW exemptions by December, 2002.

Title II - Brownfields Revitalization and Environmental Restoration – Subtitle B

The new Brownfields Law provides that, under certain circumstances, simply owning contaminated property does not result in CERCLA liability. The law clarifies Superfund liability for:

- Contiguous Property Owners
- Bona Fide Prospective Purchasers
- Innocent Landowners.

Contiguous Property Owners: property owners owning contaminated property

contiguous to a Superfund site are exempt from CERCLA liability, if the owner:

- is not otherwise liable for the contamination and is not affiliated with a liable party
- takes reasonable steps with respect to hazardous substances on the property, cooperates and provides assistance and site access, complies with land use controls, site information requests, and legal notice requirements
- conducts "all appropriate inquiry" at time of purchase and demonstrates they did not know or have reason to know of contamination.

Prospective Purchasers:
For purchasers buying contaminated property after date of enactment, potential CERCLA liability is limited to a "windfall lien" for increase in value of the property attributable to EPA's response action, provided the purchaser:

- is not otherwise liable for the contamination and is not affiliated with a liable party
- does not impede cleanup, exercises appropriate care by taking reasonable steps, cooperates and provides assistance and site access, complies with land use controls, site information requests, and legal notice requirements,
- and conducts "all appropriate inquiries" prior to purchase

EPA issued guidance on its approach to implementing the Bona Fide Prospective Purchaser amendments
in view of the limitation on liability for prospective purchasers. See, Memorandum from Barry Breen, "Bona Fide Prospective Purchasers and the New Amendments to CERCLA." (May 31, 2002). Prior to the amendments, prospective purchasers needed to enter into prospective purchaser agreements (PPAs) with EPA to address their CERCLA liability concerns. In its May 31 guidance EPA explained that by providing a statutory liability limitation, Congress had made the need for PPAs unnecessary in most instances and identified those limited circumstances where they might be appropriate.
EPA is planning on issuing guidance on implementation of the "windfall lien" provision in December 2002.

Use of Alternative Dispute Resolution in Enforcement and Compliance Activities

September 2001

Introduction

Alternative Dispute Resolution (ADR) is a tool which enhances a negotiation process and is a standard component of EPA's enforcement and compliance program. ADR should be considered at any point when negotiations are possible. This fact sheet answers common questions about the use of ADR in enforcement and compliance activities.

What is ADR?

ADR is a short-hand term for a set of processes which assist parties in resolving their disputes quickly and efficiently. Central to each method of ADR is the use of an objective third party or neutral. In this fact sheet the use of the term "ADR" refers to all ADR processes. The methods used by the Agency include the following:

- **Convening** is the first step in a dispute resolution process. A neutral party explores with the parties whether they are interested in using ADR, makes a recommendation about the most appropriate way to proceed, and assists the parties in selecting a neutral.
- **Mediation** is the primary ADR tool used by EPA. It is a voluntary and informal process in which the disputing parties select a neutral third party to assist them in reaching a negotiated settlement. Since mediators have no power to impose a solution on the parties, they help disputants shape solutions to meet the interests and needs of all parties. In mediation, EPA retains its control of the case as well as its settlement authority.
- **Allocation** is the use of third party-neutrals to assist the parties in determining their relative responsibilities for Superfund site costs.
- **Fact-finding**, often used in technical disputes, involves the

investigation of issues by a neutral party who gathers information and prepares a summary of key issues. (Fact finding is often used as part of a negotiation process.)

- **Neutral Evaluation** is a process which is useful for cases involving complex scientific and technical issues. A neutral party conducts an evaluation and provides the disputants with an assessment of the strengths and weaknesses of each party's case and a prediction about the potential outcome of the case.
- **Mini-trial** is a process in which the decision-makers for each side of a dispute hear a summary of the best case presented by the attorneys for each side. Following the presentations, the principals engage in negotiations, often with the assistance of the neutral party.
- **Arbitration** is the process in which a neutral party considers the facts and arguments presented by parties in a dispute and renders a binding or non-binding decision using applicable law and procedures.
- **Facilitation** is a process in which parties with divergent views use a neutral facilitator to improve communications and work toward agreement on a goal or the solution to a problem. The facilitator runs the process, helping the parties set ground rules, design meeting agendas, and communicate more effectively.
- **Partnering** is a collaborative process in which the participants commit to work cooperatively to improve communications and avoid disputes in order to achieve a common goal. Typically, a neutral helps the participants create a partnering agreement that defines how they will interact and what goals they seek to achieve.

What is EPA's policy on the use of ADR in enforcement actions?

EPA has utilized ADR in appropriate enforcement and compliance activities since 1987. The Administrative Dispute Resolution Act of 1996, (P.L. 104-320), 5 U.S.C. 571 (ADRA), which encourages the use of ADR in all federal disputes, strengthened EPA's enforcement and compliance ADR policy. Each Federal district court is required to establish its own ADR program and to encourage and promote the use of

ADR in its district (Alternative Dispute Resolution Act of 1998 (P.L. 105-315), 28 U.S.C. 651).

What is EPA's experience with ADR in enforcement actions?

The Agency has used ADR to assist in the resolution of over 200 enforcement-related disputes to date. ADR has been used in negotiations arising under every environmental statute that EPA enforces. Mediated negotiations have ranged from two-party Clean Water Act (CWA) cases to Superfund disputes involving upwards of 1200 parties.

Participants in the 1990 ADR pilot for Superfund cases reported the following benefits:

- constructive working relationships were developed
- obstacles to agreement and the reasons therefor were quickly identified
- mediators helped prevent stalemates
- costs of preparing a case for DOJ referral were eliminated.
- ongoing relationships were preserved.

What are the benefits of using ADR in enforcement actions?

- It lowers the transaction costs for resolving the dispute.
- Mediated negotiations tend to focus more on resolving real issues, rather than posturing, and are less likely to get derailed by personality conflicts.
- In mediation, the parties are more likely to identify settlement options that are tailored to their particular needs.
- It alleviates the time-consuming burdens on EPA of organizing negotiations because a third party neutral is available to handle these tasks. This is particularly valuable in multi-party cases.

How do I know that ADR is appropriate for my enforcement case?

If you can answer the following questions affirmatively, then ADR may be appropriate for your case:

- Are there present or foreseeable difficulties in the negotiation which will require time or resources to overcome in order

to reach settlement?

- Is your case negotiable, i.e. no precedent-setting issues are involved?
- Is there enough case information to substantiate the violation(s)?
- Is there sufficient time to negotiate in light of court or statutory deadlines, or are the parties willing to sign a tolling agreement (an understanding that a statutory deadline for starting a lawsuit will be extended)?

What ADR services are available for enforcement/compliance disputes?

Assistance for the use of ADR for enforcement and compliance cases is available by phone at any time from the Headquarters and/or Regional Enforcement/Compliance ADR Specialists, identified at the end of this fact sheet. EPA has an indefinite services contract for dispute resolution services with a management consulting firm that focuses on environmental dispute resolution and public participation. Through in-house expertise and contract support EPA can also provide assistance in: confidential consultation regarding use of ADR in specific enforcement/ compliance cases; assistance in the location, selection and contracting of ADR professionals; provision of the entire range of ADR services and logistical support of consensus building processes.

What funding is available to pay for EPA's share of ADR expenses in these enforcement/compliance cases?

Funding for ADR services needs to come from each Region's extramural funds. In the Superfund program there is a delivery order funded and managed by the Office of Site Remediation Enforcement (OSRE) for limited convening services for enforcement and compliance disputes.

What contract mechanisms are available to obtain ADR services for enforcement/ compliance related activities?

The following options are available: (1) the consensus and dispute resolution support

services contract managed by the Consensus and Dispute Resolution Program (Debbie Dalton, Project Officer, 202-564-2913), (2) expedited sole source contracting authorized by recent changes to Federal Acquisition Regulations (FAR), and (3) the Regional Enforcement Support Services (ESS) contract, depending on the language in the contract. To date, the dispute resolution support services contract has been the primary vehicle used by the ADR program.

A procurement request and other contracting documents must be submitted for each case to the appropriate contract official. It takes approximately 30 days to process the contracting documents through the contracts office. Models of an ADR procurement request and other contracting documents for enforcement actions are available on disk from the HQ ADR Team or your regional ADR Specialist. Each Region should designate a lead staff contact for contract coordination.

Who manages the contract with the selected ADR neutral in an enforcement/ compliance case?

Each site-specific use of ADR in an enforcement case requires either a separate contract or task order which is managed by the nominating region. To establish a contract or task order, the contracts office requires the designation of a Task Order Project Officer (TOPO). The Remedial Project Manager (RPM), On Scene Coordinator (OSC), or other person familiar with the case may serve as a TOPO.

What are the requirements for expedited sole source hiring of neutrals in enforcement/compliance cases?

The FAR allows for expedited sole source contracting in enforcement actions when the anticipated value of neutral services does not exceed $2500, and the price is reasonable[1]. Contracts

where the anticipated value exceeds $2500, but is less than $100,000 are set aside for small business concerns[2]. If the TOPO receives only one offer from a small business concern, the contract should be awarded to that firm. If there are no acceptable offers, the set aside is withdrawn. Sole source contracting can then be used if only one source is reasonably available[3], but the TOPO must provide a written explanation for the absence of competition[4].

How do I identify appropriate neutrals for my enforcement/ compliance case?

EPA has developed a National Roster of Environmental Dispute Resolution and Consensus Building Professionals in conjunction with the U.S. Institute for Environmental Conflict Resolution (USIECR)[5]. This Roster will be one of several sources of information which federal agencies can use to identify appropriately experienced conflict resolution professionals for use in resolving environmental and natural resource disputes or issues in controversy under the ADRA of 1996 and the Negotiated Rulemaking Act of 1996. The Roster can be used to identify neutrals for an enforcement action "when the ADR Services Contract is not appropriate, cost effective or timely." Roster information is available on the USIECR website, http://www.ecr.gov. ADR specialists and others who have been trained will be able to obtain information from the Roster for case teams.

How does a case team in an enforcement/ compliance activity select and contract with an ADR neutral for his/ her services? How long does this take?

The selection of an appropriate ADR neutral for an enforcement/compliancecase is by agreement of all parties to the dispute. The regional/ DOJ case team represents the U.S. in this decision. Assistance in identifying and considering appropriate neutrals for an enforcement action is available from the

HQ ADR Team or through EPA's contractor.
The services of the selected ADR neutral are obtained by all the parties to a dispute by entering a contract with the neutral. The contract, generally called a "mediation agreement," covers arrangements for sharing and paying the mediator's fees, the role of the mediator, confidentiality issues, and the right of any party to withdraw from the mediation. An EPA approved model mediation agreement is available on disk from your regional ADR Specialist or from the HQ ADR Team. You should use this as the basis for your negotiations in enforcement cases.

The agreement is negotiated by the case team and the private parties, with assistance, if needed, from the HQ ADR Team or an ADR expert from Marasco Newton. Experience has shown that the model agreement is generally acceptable to private parties and it often takes no longer than two weeks to obtain a signed agreement.

Does a Region have the authority to sign the agreement with the ADR professional?

Yes. Once the funding has been committed by the Agency, the Region, generally the staff attorney, signs the agreement for EPA.

How much does it usually cost to use ADR in an enforcement/ compliance case?

The cost of ADR services in an enforcement/compliance case is determined by several factors, including the ADR professional's fees and travel, costs of meeting space, and the length of settlement discussions. All costs associated with the selected ADR process are shared equitably among the parties. EPA staff

1. FAR Subpart 6.001 (a)
   FAR Subpart 13.202 (a) (2)
2. FAR Subpart 19.5
3. FAR Subpart 13.106-1 (b)(1)
4. FAR Subpart 13.106-3(a)(2)
5. The Institute is affiliated with the Morris K. Udall Foundation in Tucson,Arizona

should keep the Agency's share payment commensurate with EPA's interest in the ADR process. At present, the Agency may pay a portion of the costs of the convening process and up to 50% of the ADR costs in an enforcement/ compliance activity, where the Agency is a party to the selected ADR process. The Agency may, in appropriate circumstances, help to defray private parties' costs of obtaining ADR services in Superfund allocation deliberations. The Agency may pay up to 20% of the costs of ADR services in these situations.

The average costs of some specific ADR processes are as follows:

- Allocation is generally between $50,000 and $75,000;
- Convening costs are approximately $25,000; and
- Community involvement cases are usually between $100,000 and $150,000 depending on the number of stakeholders and the complexity of the issues.

Why must the costs associated with using ADR in enforcement/ compliance activities be shared equitably by the parties?

To assure the neutrality of the ADR professional involved, it is important that all parties to the dispute share the costs to the greatest extent possible. This creates a more equal ground and prevents parties from feeling any bias in an enforcement/compliance action. Some parties can provide in-kind contributions towards the cost of ADR when they are unable to provide an equal share of the costs. In all other cases, EPA must share the costs of a neutral's services with the other parties to an enforcement/compliance dispute.

Are there specific guidelines for the use of arbitration in EPA enforcement and compliance activities?

Section 575 of the ADRA permits the use of binding arbitration in an enforcement action with the consent of all parties and eliminates the Agency's right to vacate an award issued within 30 days.

However, prior to using binding arbitration, the Agency must have issued guidance on the appropriate use of arbitration[6]. The act has two other prerequisites: 1) arbitration agreements[7] must specify a maximum award, and 2) the person offering to use arbitration must have settlement authority. At present EPA may enter into binding arbitration for Superfund cost recovery claims not exceeding $500,000 (excluding interest) under CERCLA Section 122(h)(2), 42 U.S.C. 9622(h)(2) and 40 C.F.R. 304 (1996). This regulation requires that the Administrator and one or more Potentially Responsible Parties (PRPs) submit a joint request for arbitration.

Are government payments made to an ADR professional in a Superfund action tracked and recoverable as site costs for cost recovery purposes?

Expenditures by the Agency in support of the use of ADR in a Superfund action are cost recoverable expenses, reimbursement of which may be obtained through regional settlements or legal action. Regions may exercise their enforcement discretion regarding recovery of ADR expenditures. Each ADR case is assigned a separate task order or contract to allow for site tracking of ADR expenses.

Is training available for the use of ADR in enforcement actions?

Yes. A one day overview training on the use of ADR in enforcement negotiations is offered in all of the regions. Furthermore, there are ADR components in several other popular EPA training courses. If you are interested in the training schedule for the current year call NETI at (202-564-6069).

6. 40 C.F.R. 304
7. Agreements to arbitrate are enforceable pursuant to 9 U.S.C. 4

Enforcement/Compliance ADR Specialists

NAME	PHONE #	FAX #
Region 1		
Ellie Tonkin	617/918-1726	918-1809
Marcia Lamel	918-1778	918-1809
Doug Thompson	918-1543	918-1809
Andrea Simpson	918-1738	918-1809
Catherine Garypie	918-1540	918-1809
Region 2		
Tom Lieber	212/637-3158	637-3115
Janet Conetta	637-4417	637-4429
Region 3		
Pat Hilsinger	215/814-2642	814-2601
Joan A. Johnson	814-2619	814-3001
Region 4		
Lisa Ellis	404/562-9541	562-9486
Region 5		
John Tielsch	312/353-7447	886-7160
Beth Henning	312/886-5892	353-9176
Region 6		
Jim Dahl	214/665-2151	665-2182
Manisha Patel	665-2770	665-6660
Region 7		
Cheryle Micinski	913/551-7274	551-7925
Region 8		
Maureen O'Reilly	303/312-6402	312-6409
Karen Kellen	312-6518	312-6953
Arnie Ondarza	312-6777	312-7025
Region 9		
Kim Muratore	415/744-2373	744-1917
Marie Rongone	744-1313	744-1041
Allyn Stern	744-1372	744-1041
Region 10		
Ted Yackulic	206/553-1218	553-0163

HQ Enforcement/Compliance ADR Team

David Batson	202/564-5103	564-0093
Lee Scharf	564-5143	564-0091
Phil Page	564-4211	564-0091

Policy Toward Owners of Property Containing Contaminated Aquifers

United States Environmental Protection Agency
Office of Enforcement and Compliance Assurance
November 1995

This fact sheet summarizes a new EPA policy regarding groundwater contamination. The "Policy Toward Owners of Property Containing Contaminated Aquifers" was issued as part of EPA's Brownfields Economic Redevelopment Initiative which helps states, communities, and other stakeholders in economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and sustainably reuse brownfields. Brownfields are abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.

EPA issued this policy to help owners of property to which groundwater contamination has migrated or is likely to migrate from a source outside the property. This fact sheet is based on EPA's interpretation of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly known as Superfund) and existing EPA guidance. Under the policy, EPA will not take action to compel such property owners to perform cleanups or to reimburse the agency for cleanup costs. EPA may also consider *de minimis* settlements with such owners if they are threatened with law suits by third parties.

Background

Approximately eighty-five percent of the sites listed on the National Priorities List involve some degree of groundwater contamination. The effects of such contamination are often widespread because of natural subsurface processes such as

infiltration and groundwater flow. It is sometimes difficult to determine the source of groundwater contamination.

Under Section 107(a)(l) of CERCLA (also found at 42 United States Code § 9607(a)(l)), any "owner" of contaminated property is normally liable regardless of fault. This section of CERCLA creates uncertainty about the liability of owners of land containing contaminated aquifers who did not cause the contamination. This uncertainty makes potential buyers and lenders hesitant to invest in property containing contaminated groundwater. The intent of the Contaminated Aquifer Policy is to lower the barriers to the transfer of property by reducing the uncertainty regarding future liability. It is EPA's hope that by clarifying its approach towards these landowners, third parties will act accordingly.

Policy Summary

EPA will exercise its enforcement discretion by not taking action against a property owner to require clean up or the payment of clean-up costs where: 1) hazardous substances have come to the property solely as the result of subsurface migration in an aquifer from a source outside the property, and 2) the landowner did not cause, contribute to, or aggravate the release or threat of release of any hazardous substances. Where a property owner is brought into third party litigation, EPA will consider entering a *de minimis* settlement.

Elements of the Policy

There are three major issues which must be analyzed to determine whether a particular landowner will be protected from liability by this policy:

- the landowner's role in the contamination of the aquifer;
- the landowner's relationship to the person who contaminated the aquifer; and
- the existence of any groundwater wells on the landowner's property that affect the spread of contamination within the aquifer.

Landowner's Role in the Contamination of the Aquifer

A landowner seeking protection from liability under this policy must not have caused or contributed to the source of contamination. However, failure to take steps to mitigate or address groundwater contamination, such as conducting groundwater investigations or installing groundwater remediation systems, will not, in the absence of exceptional circumstances, preclude a landowner from the protection of this policy.

Landowner's Relationship to the Person who Caused the Aquifer Contamination

First, this policy requires that the original contamination must not have been caused by an agent or employee of the landowner. Second, the property owner must not have a contractual relationship with the polluter. A contractual relationship includes a deed, land contract, or instrument transferring possession. Third, Superfund requires that the landowner inquire into the previous ownership and use of the land to minimize liability. Thus, if the landowner buys a property from the person who caused the original contamination after the contamination occurred, the policy will not apply if the landowner knew of the disposal of hazardous substances at the time the property was acquired. For example, where the property at issue was originally part of a larger parcel owned by a person who caused the release and the property is subdivided and sold to the current owner, **who is aware of the pollution and the subdivision,** there may be a direct or indirect "contractual relationship" between the person that caused the release and the current landowner. In this instance, the owner would not be protected by the policy.

In contrast, land contracts or instruments transferring title are not considered contractual relationships under CERCLA if the land was acquired after the disposal of the hazardous substances and the current landowner did not know, and had no reason to know, that

any hazardous substance had migrated into the land.

The Presence of a Groundwater Well on the Landowner's Property and its Effects on the Spread of Contamination in the Aquifer

Since a groundwater well may affect the migration of contamination in an aquifer, EPA's policy requires a fact-specific analysis of the circumstances, including, but not limited to, the impact of the well and/or the owner's use of it on the spread or containment of the contamination in the aquifer.

Common Questions Regarding Application of the Policy

"If a prospective buyer knows of aquifer contamination on a piece of property at the time of purchase, is he or she automatically liable for clean-up costs?"

No. In such a case the buyer's liability depends on the seller's involvement in the aquifer contamination. If the seller would have qualified for protection under this policy, the buyer will be protected. For example, if the seller of the property was a landowner who bought the property without knowledge, did not contribute to the contamination of the aquifer and had no contractual relationship with the polluter, then the buyer may take advantage of this policy, ***despite*** knowledge of the aquifer contamination.

In contrast, if the seller has a contractual relationship with the polluter and the buyer ***knows*** of the contamination, then this policy will not protect the buyer.

"If an original parcel of property contains one section which has been contaminated by the seller and another uncontaminated section which is threatened with contamination migrating through the aquifer, can a buyer be protected under the policy if he or she buys the threatened section of the property?"

The purchase of the threatened parcel separate from the contaminated parcel establishes a contractual relationship between the buyer and the person responsible for the threat. This policy will not protect such a buyer unless the buyer can establish that he or she did not know of the pollution at the time of the purchase and had no reason to know of the pollution. To establish such lack of knowledge the buyer must prove that at the time he acquired the property he inquired into the previous ownership and uses of the property.

Protection from Third Party Law Suits

Finally, EPA will consider *de minimis* settlements with landowners who meet the requirements of this policy if a landowner has been sued or is threatened with third-party suits. A *de minimis* settlement is an agreement between the EPA and a landowner who may be liable for clean up of a small portion of the hazardous waste at a particular site. To be eligible for such a settlement, the landowner must not have handled the hazardous waste and must not have contributed to its release or the threat of its release. Once the EPA enters into a *de minimis* settlement with a landowner, third parties may not sue that landowner for the costs of clean-up operations.

Whether or not the Agency issues a *de minimis* settlement, EPA may seek the landowner's full cooperation (including access to the property) in evaluating and implementing cleanup at the site.

For further information contact:
This policy was issued on May 24, 1995 and published in the Federal Register on July 3, 1995 (volume 60, page 34790). You may order a copy of the policy from the National Technical Information Service (NTIS), U.S. Department of Commerce, 5825 Port Royal Rd., Springfield, VA 22161.

Orders must reference NTIS accession number PB96-109145.

For telephone orders or further information on placing an order:
call NTIS at
(703) 487-4650
for regular service, or
(800) 553-NTIS for rush service.

For orders via e-mail/Intemet, send to the following address:
orders@ntis.fedworld.gov
For more information about the Contaminated Aquifer Policy, call Elisabeth Freed, (202) 564-5117, Office of Site Remediation Enforcement.

Fact Sheet

The Effect of Superfund on Involuntary Acquisitions of Contaminated Property by Government Entities

United States Environmental Protection Agency
Office of Enforcement and Compliance Assurance
December 1995

Units of state, local, and federal government sometimes involuntarily acquire contaminated property as a result of performing their governmental duties. Government entities often wonder whether these acquisitions will result in Superfund liability. This fact sheet summarizes EPA's policy on Superfund enforcement against government entities that involuntarily acquire contaminated property. This fact sheet also describes some types of government actions that EPA believes qualify for a liability exemption or a defense to Superfund liability.

Introduction

EPA's Brownfields Economic Redevelopment Initiative is designed to help states, communities, and other stakeholders in economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and sustainably reuse brownfields. Brownfields are abandoned, idled, or underused industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination. Many municipalities and other government entities are eager for brownfields to be redeveloped but often hesitate to take any steps at these facilities because they fear that they will incur Superfund liability.

This fact sheet answers common questions about the effect of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly known as Superfund, and set forth at 42 United States Code

beginning at Section 9601) on involuntary acquisitions by government entities. EPA hopes that this fact sheet will facilitate government entities' plans for redevelopment of brownfields and the "brokerage" of those facilities to prospective purchasers.

What is an involuntary acquisition?

EPA considers an acquisition to be "involuntary" if it meets the following test:

- The government's interest in, and ultimate ownership of, the property exists only because **the actions of a non-governmental party give rise to the government's legal right to control or take title to the property.**

For example, a government's acquisition of property for which a citizen failed to pay taxes is an involuntary acquisition because the citizen's tax delinquency gives rise to the government's legal right to take title to the property.

Will a government entity that involuntarily acquires contaminated property be liable under CERCLA?

To protect certain parties from liability, CERCLA contains both liability exemptions and affirmative defenses to liability. A party who is exempt from CERCLA liability with respect to a specified act cannot be held liable under CERCLA for committing that act. A party who believes that he or she has an affirmative defense to CERCLA liability must prove so by a preponderance of the evidence.

After it involuntarily acquires contaminated property, a unit of state or local government will generally be exempt from CERCLA liability as an owner or operator. In addition, the unit of state or local government will have a somewhat redundant affirmative defense to CERCLA liability known as a "third-party" defense, provided other requirements for the defense, which are described below, are met. A federal government entity that involuntarily acquires contaminated prop-

erty and meets the requirements described below will have a third-party defense to CERCLA liability.

The requirements for a third-party defense to CERCLA liability are the following:

- The contamination occurred before the government entity acquired the property;
- The government entity exercised due care with respect to the contamination (e.g., did not cause, contribute to, or exacerbate the contamination); and
- The government entity took precautions against certain acts of the party that caused the contamination and against the consequences of those acts.

A government entity will **not** have a CERCLA liability exemption or defense if it has caused or contributed to the release or threatened release of contamination from the property. As a result, acquiring property involuntarily does not unconditionally or permanently insulate a government entity from CERCLA liability. Government entities should therefore ensure that they do not cause or contribute to the actual or potential release of hazardous substances at facilities that they have acquired involuntarily. For more information, see 42 U.S.C. 9601(20) (D), 9607(b)(3), and 9601(35)(A) and (D).

It is also important to note that the liability exemption and defense described above do not shield government entities from any potential liability that they may have as "generators" or "transporters" of hazardous substances under CERCLA. For additional information, see 42 U.S.C. 9607(a).

What are some examples of involuntary acquisitions?

CERCLA provides a non-exhaustive list of examples of involuntary acquisitions by government entities. These examples include **acquisitions following abandonment, bankruptcy, tax delinquency, escheat** (the transfer of a deceased person's property to the government when there are no competent

heirs to the property), **and other circumstances in which the government involuntarily obtains title by virtue of its function as a sovereign.**

What is EPA's official policy regarding CERCLA enforcement against government entities that involuntarily acquire contaminated property?

In 1992, EPA issued its Rule on Lender Liability Under CERCLA ("Rule"), 57 *Federal Register* 18344 (April 29, 1992). The Rule included a discussion of involuntary acquisitions by government entities. In 1994, the Rule was invalidated by the court.

In September 1995, EPA and the U.S. Department of Justice (DOJ) issued their "Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily" ("Lender Policy"). In the document, EPA and DOJ reaffirm their intentions to follow the provisions of the Rule as enforcement policy. The Lender Policy advises EPA and DOJ personnel to consult both the Rule and its preamble while exercising their enforcement discretion with respect to government entities that acquire property involuntarily. Most of the relevant portions of the Rule and preamble have been summarized in this fact sheet.

Under the Lender Policy, EPA has expanded the examples listed in CERCLA by describing the following categories of involuntary acquisitions:

- Acquisitions made by government entities **acting as a conservator or receiver pursuant to a clear and direct statutory mandate or regulatory authority** (such as acquisition of the security interests or properties of failed private lending or depository institutions);
- Acquisitions by government entities through **foreclosure and its equivalents while administering a governmental loan, loan guarantee, or loan insurance program;** and
- Acquisitions by government entities **pursuant to seizure or forfeiture authority.**

Similar to the examples listed in CERCLA, EPA's list of

categories of involuntary acquisitions is non-exhaustive. To determine whether an activity not listed in CERCLA or under the Lender Policy is an "involuntary acquisition," one should analyze whether the actions of a non-governmental party give rise to the government's legal right to control or take title to the property.

If a government entity takes some sort of voluntary action before acquiring the property, can the acquisition still be considered "involuntary"?

Yes. Involuntary acquisitions, including the examples listed in CERCLA, generally require some sort of discretionary, volitional action by the government. A government entity need not be completely "passive" in order for the acquisition to be considered "involuntary" for purposes of CERCLA. For further discussion, see 57 *Fed. Reg*. 18372 and 18381.

Will a government entity that involuntarily acquires contaminated property be liable under CERCLA to potentially responsible parties and other non-federal entities?

If a unit of state or local government involuntarily acquires property through any of the means listed in CERCLA, it will be exempt from CERCLA liability as an owner or operator. In addition, any government entity will have a third-party defense to CERCLA liability if all relevant requirements for that defense are met (see above).

If a government entity acquires property through any other means, it appears likely-based on the way that courts have treated lender issues during the last few years - that a court would apply principles and rationale that are consistent with EPA and DOJ's Lender Policy. Analysis of these acquisitions may require an examination of case law and state or local laws.

If someone dies and leaves

contaminated property to a government entity, is this considered an involuntary acquisition?

No, this type of property transfer is not considered an involuntary acquisition under CERCLA. However, CERCLA provides a third-party defense for parties that acquire property by inheritance or bequest (a gift given through a will). Thus, a government entity that acquires property in this manner will have a third-party defense to CERCLA liability if all relevant requirements of that defense are met and the government entity has not caused or contributed to the release or threatened release of contamination from the property (see above). For more information, see 42 U.S.C. 9607(b)(3) and 9601 (35)(A) and (D).

Will a government entity that uses its power of eminent domain be liable under CERCLA?

After a government entity acquires property through the exercise of eminent domain (the government's power to take private property for public use) by purchase or condemnation, it will have a third-party defense to CERCLA liability if all requirements for that defense are met (see above). For more information, see 42 U.S.C. 9607(b)(3) and 9601(35)(A).

Will parties that purchase contaminated property from government entities also be exempt from CERCLA liability?

No. Nothing in CERCLA allows non-governmental parties to be exempt from liability after they knowingly purchase contaminated property. However, EPA encourages prospective purchasers of contaminated property to contact their state environmental agencies to discuss these properties on a site-by-site basis. At sites where an EPA action has been taken, is ongoing, or is anticipated to be undertaken, various tools, including "prospective purchaser agreements," may be an option.

For further information:

The Lender Policy was published in the Federal Register in Volume 60, Number 237, at pages 63517 to 63519 (December 11, 1995).

You may order copies of the Lender Policy from the National Technical Information Service (NTIS), U.S. Department of Commerce, 5285 Port Royal Rd., Springfield, VA 22161. Orders must reference NTIS accession number PB95-234498. For telephone orders or further information on placing an order, call NTIS at 703-487-4650 for regular service or 800-553-NTIS for rush service. For orders via e-mail/ Internet, send to the following address orders @ ntis.fedworld.gov

If you have questions about this fact sheet, contact Bob Kenney of EPA's Office of Site Remediation Enforcement at (202) 564-5127.

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Fact Sheet

Using Supplemental Environmental Projects to Facilitate Brownfields Re-development

United States Environmental Protection Agency
Office of Enforcement and Compliance Assurance
330-F-98-001
Office of Site Remediation Enforcement
Policy and Program Evaluation Division 2273G
September 1998

In April 1998, EPA issued the final "Supplemental Environmental Projects Policy." In that policy EPA encourages the use of Supplemental Environmental Projects in the settlement of environmental enforcement actions. Using SEPs to assess or cleanup brownfield properties is an effective way to enhance the environmental quality and economic vitality of areas in which the enforcement actions were necessary,

Introduction

In settlements of environmental enforcement cases, defendant/respondents often pay civil penalties. EPA encourages parties to include Supplemental Environmental Projects (SEPs) in these settlements and will take SEPs into account in setting appropriate penalties. While penalties play an important role in deterring environmental and public health violations, SEPs can play an additional role in securing significant environmental and public health protection and improvement. EPA's final Supplemental Environmental Projects Policy (SEP Policy) describes seven categories of SEPs, the legal guidelines for designing such projects, and the methodology for calculating penalty credits. In certain cases, SEPs may facilitate the reuse of "brownfield" property. This fact sheet answers common questions about how SEPs can be used in the brownfields context.

What are Brownfields?

EPA defines brownfields as abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination. In many cases assessment of the environmental condition of a property is all that is necessary to spur its reuse. Through the Brownfields Economic Development Initiative, EPA has developed a number of tools to prevent, assess, safely cleanup and promote the sustainable reuse of brownfields. SEPs are one of the tools that can be used at brownfields properties.

What is a SEP?

A SEP is an environmentally beneficial project that a defendant/respondent agrees to undertake in settlement of a civil penalty action, but that the defendant/respondent is not otherwise legally required to perform. In return, a percentage of the SEP's cost is considered as a factor in establishing the amount of a final cash penalty. SEPs enhance the environmental quality of communities that have been put at risk due to the violation of an environmental law.

Meeting Legal Requirements

The SEP Policy has been carefully structured to ensure that each SEP negotiated by EPA is within the Agency's authority and consistent with statutory and Constitutional requirements. Although all of the legal requirements in the Policy must be met when considering a SEP at a brownfield, the following requirements are particularly important:

SEPs at Brownfields Cannot Include Action that the Defendant/Respondent is Otherwise Legally Required to Perform

Activities at a brownfield site for which the defendant/respondent is otherwise legally required to perform under federal, state, or local law or regulation cannot constitute a SEP. This restriction includes actions that the defendant/respondent

is likely to be required to perform (1) as injunctive relief in any action brought by EPA or another regulatory agency, or (2) as part of an order or existing settlement in another legal action. This restriction does not pertain to actions that a regulatory agency could compel the defendant/respondent to undertake if the Agency is *unlikely* to exercise that authority.

As a general rule, if a party owns a brownfield or is responsible for the primary environmental degradation at a site, assessment or cleanup activities cannot constitute a SEP.

SEPs at Brownfield Require an Adequate Nexus between the Violation and the Project

The SEP Policy requires that a relationship, or nexus, exist between the violation and the proposed project. A SEP at a brownfield will generally satisfy the nexus requirement if the action enhances the overall public health or environmental quality of the area put at risk by the violation.

A SEP is not required to be at the same facility where the violation occurred provided that it is within the same ecosystem or within the immediate geographical area. In general, the nexus requirement will be satisfied if the brownfield is within a 50 mile radius of the site from which the violation occurred. However, location alone is not sufficient to satisfy the nexus requirement - the environment where the brownfield is located must be affected or potentially threatened by the violation.

A relationship between the statutory authority for the penalty and the nature of the SEP is not required in order for the nexus test to be met. Therefore, the violation need not relate to hazardous waste or contaminated properties in order for EPA to consider a SEP at a brownfield. (e.g., in the case of a Clean Air Act violation, EPA could approve a SEP at a brownfield).

SEPs at Brownfields Cannot include Actions that the Federal Government is Likely to Undertake or Compel Another to Undertake

If EPA or another federal agency has a statutory obligation to assess, investigate, or take other response actions at a brownfield, or to issue an order compelling another to take such action, the Agency may not negotiate a SEP whereby the defendant/ respondent carries out those activities.

As a general rule, SEPs are inappropriate at the following site types because of EPA's statutory obligations:

- sites on the National Priorities List under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), § 105, 40 CFR Part 300, Appendix B;
- sites where the federal government is planning or conducting a removal action pursuant to CERCLA § 104(a) and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR § 300.415; and
- sites for which the defendant/ respondent or other party would likely be ordered to perform an assessment, response, or remediation activity pursuant to CERCLA § 106, the Resource Conservation and Recovery Act (RCRA), § 3013, § 7003, § 3008(h), the Clean Water Act (CWA) § 311, and other federal law.

SEPs may be Performed at Brownfields Involuntarily Acquired by Municipalities

As stated above, if EPA would likely issue an order compelling a Party to cleanup a brownfield, such remedial action cannot be the subject of a SEP. Pursuant to the portion of the CERCLA Lender Liability Rule addressing involuntary acquisitions, 40 C.F.R. § 300.115, the Agency will not issue a remediation order to a municipality that has involuntarily acquired a brownfield even if the Agency would otherwise issue such an order to a private owner. Therefore, if

(1) a brownfield is acquired involuntarily by a local government,

(2) there are no other potential liable parties, and

(3) the known level of contamination would not compel the Agency to take action itself,

a SEP at this property would be appropriate.

SEPs May Be Limited at Brownfields that Received Federal Funds

A SEP cannot provide a municipality, state, or other entity that has received a federal Brownfields Assessment Demonstration Pilot or other federal brownfields grant with additional funds to perform a specific task identified within the assistance agreement. If a defendant/respondent proposes a SEP whereby the party provides money to a local government to assess or cleanup a brownfield, the municipality must not have received a federal grant to carry out the same work. Similarly, a defendant/respondent cannot on its own undertake assessment or other response work at a brownfield when a grant recipient has received federal funds to undertake the same project. A SEP could, however, include additional cleanup activities at a site so long as those activities are not the same as those performed with federal brownfield funding. For example, at a site which a federal Brownfields Targeted Site Assessment is performed, a SEP that cleans up the same site would be an appropriate project (provided that a CERCLA 104(a) removal action is not warranted).

Selecting an Appropriate SEP Activity for a Brownfield Site

The SEP Policy identifies two categories of SEPs that are appropriate for brownfields.

Environmental Quality Assessment Projects

In general terms, environmental quality assessments involve investigating or monitoring the environmental media at a property. To be eligible as SEPs, such activities must be conducted in accordance with recognized protocols, if applicable, for the type of work to be undertaken.

Assessment projects may not, as indicated, include work that the federal government would undertake itself or issue an order to accomplish. Therefore if a SEP involves an assessment of site conditions at a brownfield, the site must not be one where EPA is planning or conducting assessment activities. Both CERCLIS and EPA's Pre-CERCLIS Screening Guidance are useful to determine whether a federal assessment is warranted or planned.

Environmental Restoration Projects

For sites at which contamination does exist, but where an EPA response action or order to a party is not warranted, a SEP may involve removing or remediating contaminated media or material. Restoration SEPs can involve restoring natural environments, such as ecosystems, or man-made environments, such as facilities and buildings. Creating conservation land, such as transforming a former landfill into wilderness land may be an appropriate SEP. The removal of substances that the federal government does not have clear authority to address, such as contained asbestos or lead paint, may also constitute an appropriate restoration project.

Community Input

No one can judge the value to a community of an assessment or cleanup project at a brownfield better than the community in which the site is located. Local communities are the most affected by environmental violations, and have the most to gain by SEPs that address their concerns. Therefore, in appropriate cases local communities should be afforded an opportunity to comment on and contribute to the design of proposed SEPs at brownfield sites. Accordingly, Regions are encouraged to promote public involvement in accordance with the Community Input procedures set forth within the SEP Policy.

Evaluation Checklist for SEPs at Brownfields

On the next page, two ex-

amples are provided to demonstrate typical proposals Regions may receive from parties that wish conduct SEPs at brownfields. One of the proposals would be approved and the other would not. A checklist of questions along with answers is provided to demonstrate the analysis Regions should apply when considering such requests.

For further information contact:
If you have any questions regarding this fact sheet, please contact the Office of Site Remediation Enforcement at (202) 564-5100. To access the SEP Policy on the internet, open page: http://epa.gov/compliance/resources/policies/cleanup/superfund/proj-brownf-mem.pdf

For further information about EPA's Brownfield Economic Development Initiative go to page http://www.epa.gov/brownfields

Hypothetical A:

The Company A owns and operates a manufacturing facility in downtown Cityville. The company uses solvents as part of its manufacturing process. During its operation, Company A discharges wastewater into the Running River. EPA alleges that on at least one occasion, the level of solvents in the wastewater exceeded the level specified in EPA's effluent standards under the Clean Water Act.

EPA filed a civil complaint seeking penalties for the CWA violation. Company A proposed doing a SEP to partly reduce the penalty. The project involves assessing the environmental conditions of a nearby abandoned lot. The lot is owned not by the Company, but by the Cityville government, which obtained title from the previous owner via tax foreclosure. To date, Cityville has been attempting to interest developers in the property but to no avail due to concerns regarding possible contamination from a prior industrial operation at the lot. To determine the extent of contamination, Cityville recently received a federal Brownfields Assessment Demonstration Pilot.

Hypothetical B:

Company B owns and operates a factory in downtown Springfield. EPA conducted an inspection of the factory's air emissions and determined that the Company has violated certain Clean Air Act (CAA) standards resulting in the release of air pollutants into the nearby neighborhood. EPA filed a civil complaint seeking penalties for the CAA violations. Company B proposed doing a SEP that involves the cleanup of debris at an abandoned parcel located several blocks away, downwind from Company B's factory. The lot is filled with used tires and abandoned trash, and is infested with vermin. The lot is the site of a former bakery which long ago went bankrupt. There is no history of any past industrial operation on-site.

CHECKLIST

• Does the project contribute to the revitalization of an abandoned, idled, or under-used industrial or commercial property where redevelopment has been complicated by real or perceived environmental contamination?

A. Yes. Conducting soil sampling will help revitalize the abandoned lot because it will resolve the questionable environmental condition of the property that has discouraged developers.

B. Yes. Cleaning up the used tires and trash and addressing the vermin problem at this former bakery site will make the property more attractive to developers.

• Does the project include actions that the defendant/respondent would otherwise likely be required to perform under federal, state, or local law or regulation? Is there a court or administrative order or existing settlement agreement that would obligate the defendant/respondent to undertake the proposed project?

A. No. Company A does not own the property, and there is no reason to suspect that Company A would be responsible for any contamination that may be discovered at the site.

B. No. Company B does not own the property, and there is no reason to suspect that the company would be required under federal, state, or local law to remove debris from the site.

• Is there an adequate nexus between the violation and the brownfield? Is the project within the same ecosystem or within a 50 mile radius of the facility where the violation occurred?

A. Yes. The site is located close to the Company's facility, and the proposed SEP addresses the same ecosystem and human population threatened by the Company's wastewater discharge.

B. Yes. The abandoned parcel is located downwind of Company B's factory. The proposed SEP addresses the same ecosystem and human population threatened by the illegal air emissions.

• Does the SEP address environmental conditions that the federal government is statutorily obligated to either address itself or order another to address? Is the site on CERCLA's National Priorities List? Is the Agency likely to conduct a removal under CERCLA, or might the Agency order any party to perform remediation activity pursuant to CERCLA, RCRA, or the CWA?

A. No. There is no indication that EPA has documented any contamination at the site or would investigate the abandoned lot. Therefore, there is no reason to believe that the Agency would consider conducting an investigation or removal action or compel any party to undertake such activities.

B. No. There is no indication that the federal government has a statutory obligation to remove debris from the abandoned parcel. The site is not on the National Priorities List, and there is no reason to believe that the types of debris at issue would warrant the Agency to conduct a removal action or compel any party to undertake any response activity.

• Does the SEP provide a municipality, state, or other entity that has received a federal brownfields grant additional funds to perform a specific task identified within the assistance agreement? Does the defendant/respondent seek to undertake work at a site where a federal grant recipient has received an award to undertake the same work?

A. Yes. Cityville has received funding through a federal Brownfields Assessment Demonstration Pilot.

B. No. There is no indication that Springfield or any entity has received a federal grant to clean up the property.

• Does the SEP involve an Environmental Quality Assessment Project or an Environmental Restoration Project?

A. Yes. The soil sampling project can be categorized as an Environmental Quality Assessment Project.

B. Yes. Removal of the debris can be categorized as an Environmental Restoration Project.

Brownfields and RCRA Fact Sheet

United States Environmental Protection Agency
Office of Site Remediation Enforcement
EPA 330/F/99/001
November 1999

Background

In February 1995, EPA announced its Brownfields Action Agenda, launching the first federal effort of its kind designed to empower states, tribes, communities, and other parties to safely cleanup, and return brownfields to productive use. Building on the original agenda, in 1997 EPA initiated the Brownfields National Partnership Agenda, involving nearly 20 other federal agencies in brownfields cleanup and reuse. Since the 1995 announcement, EPA has funded brownfield pilot projects, reduced barriers to cleanup and redevelopment by clarifying environmental liability issues, developed partnerships with interested stakeholders, and stressed the importance of environmental workforce training.

To date, EPA has focused primarily on brownfield issues associated with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund). Representatives from cities and industries, as well as other stakeholders however, have begun emphasizing the importance of looking beyond CERCLA and addressing environmental issues at brownfield sites in a more comprehensive manner, including issues related to the Resource Conservation and Recovery Act (RCRA). This fact sheet provides a brief overview of RCRA and its potential requirements for parties dealing with

> Brownfields are abandoned, idled, or underused industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.

brownfields and their associated assessment and cleanup activities.

RCRA

The Resource Conservation and Recovery Act, an amendment to the Solid Waste Disposal Act, was enacted in 1976 to address a problem of enormous magnitude--the huge volumes of municipal and industrial solid waste generated nationwide. Generally, the RCRA program focuses on prevention rather than cleanup.

RCRA allows the state to assume responsibility for implementing a hazardous waste regulatory program, with oversight from the federal government. In order for a state to implement such a program under RCRA, it must receive authorization from EPA. To obtain authorization the state program must be at least equivalent to and consistent with the federal rules, and must provide for adequate enforcement. In states that have received authorization, known as "authorized states," the state's authorized hazardous waste program applies in lieu of the

Table 1

RCRA's Three Interrelated Programs

Subtitle D	Subtitle C	Subtitle I
Solid Waste Program Focuses on state and local governments as the primary planning, regulation, and implementing entities for the management of nonhazardous solid waste, such as household garbage and nonhazardous industrial solid waste.	Hazardous Waste Program Establishes a system for controlling hazardous waste from the time it is generated until its ultimate disposal - in effect, from cradle to grave.	Underground Storage Tank Program Regulates underground tanks storing hazardous substances and petroleum products. Major objectives are to prevent and clean up releases from these tanks.

federal program, although EPA retains its enforcement authorities.

RCRA establishes three distinct yet interrelated programs. The solid waste program, under RCRA Subtitle D, encourages states to develop comprehensive plans to manage nonhazardous industrial solid waste and municipal solid waste, sets criteria for municipal solid waste landfills and other solid waste disposal facilities, and prohibits the open dumping of solid waste. The underground storage tank (UST) program, under RCRA Subtitle I regulates underground tanks storing hazardous substances (but not hazardous waste) and petroleum products. Subtitle C of RCRA provides for the comprehensive regulation of hazardous waste. When fully implemented, this program provides "cradle-to-grave" regulation of hazardous waste by establishing a system for controlling and tracking the waste from its generation through its ultimate disposal.

The hazardous waste requirements under RCRA Subtitle C are the focus of this fact sheet because brownfield activities may, in certain instances, involve the management of hazardous waste.

RCRA's Cradle-to-Grave Hazardous Waste Management System

Under RCRA Subtitle C, EPA has developed a comprehensive program to ensure that hazardous waste is managed safely from the moment it is generated; while it is transported, treated, or stored; including final disposal (see Figure 1). Therefore, Subtitle C requirements apply to three

Figure 1

classes of hazardous waste handlers: generators; transporters; and treatment, storage or disposal facilities.

Generators
Subtitle C regulations broadly define the term generator to include any person who:

- First creates or produces a hazardous waste (e.g., from an industrial process)

  OR

- First brings a hazardous waste into the RCRA Subtitle C system (e.g., imports a hazardous waste into the US).

Hazardous waste (HW) generators may include various types of facilities and businesses ranging from large manufacturing operations, universities, and hospitals to small businesses and laboratories. Because these different types of facilities generate different volumes of wastes resulting in varying degrees of environmental risk, RCRA regulates generators based on the amount of waste they generate in a calendar month. There are three categories of hazardous waste generators (see Table 2).

Transporters
A hazardous waste transporter is any person engaged in the off-site transportation of hazardous waste within the United States, if such transportation requires a manifest (generated by a small quantity generator or large quantity generator). Off-site transportation includes shipments from a hazardous waste generator's facility to another facility for treatment, storage, or disposal. Regulated off-site transportation includes shipments of hazardous waste by air, rail, highway, or water.

Treatment, Storage, and Disposal Facilities (TSDFs)
The requirements for treatment, storage, and disposal facilities (TSDFs) are more extensive than the standards for generators and transporters. They include general facility operating standards, as well as standards for the various types of units in which hazardous waste is managed. With some excep-

tions, a TSDF is a facility engaged in one or more of the following activities:

- Treatment - Any method, technique, or process designed to physically, chemically, or biologically change the nature of a hazardous waste
- Storage - Holding hazardous waste for a temporary period (greater than 90 days), after which that hazardous waste is treated, disposed of, or stored elsewhere
- Disposal - The discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid or hazardous waste on or in the land or water.

Identifying Hazardous Waste

Determining whether a material must be managed in accordance with subtitle C regulatory requirements involves three steps. The **first step** in the hazardous waste identification process is determining if a waste is a solid waste. With some exceptions, the regulations define solid waste as any material that is discarded, regardless of its physical state (i.e., solid, liquid, semi-solid, or contained gas). For more information on the exceptions see 40 CFR Part 261.4. Once a waste is classified as a solid waste, the **second step** is to determine whether the waste is hazardous as defined by the Subtitle C hazardous waste regulation.

According to EPA definitions, a material can be hazardous if it falls into one of the following categories:

- It exhibits a "characteristic" of hazardous waste (see 40 CFR Part 261, Subpart D).
- The Agency has specifically designated (or "listed") the material as hazardous (see 40 CFR Part 261, Subpart D).

Characteristic wastes are hazardous because their inherent properties exhibit one or more of the following: ignitability (some paints and cleaning agents are examples), corrosivity (such as waste sulfuric acid from car batteries), reactivity (e.g., discarded explosives), or toxicity (e.g., lead or arsenic). Regulations in Part 261 define

these properties.

Listed wastes are wastes from particular industrial processes, wastes from certain industry sectors, and certain unused chemical formulations when discarded or intended for discard.

The **third step** for determining whether RCRA Subtitle C requirements apply is what one does with the material: that is, how is the character-istic or listed material being handled.

RCRA as it Relates to Brownfields

Brownfields may come under RCRA jurisdiction in two ways. First, RCRA cleanup requirements apply at brownfields that are RCRA treatment, storage or disposal facilities (TSDF). All treatment storage or disposal facilities are required to obtain a RCRA permit. Unless the site becomes subject to

Table 2

Generator Categories

Large Quantity Generators

Large quantity generators (LQGs) - defined as those facilities that generate:

- 1,000 kg of hazardous waste per calendar month or greater

OR

- Greater than 1 kg of acutely hazardous waste per calendar month

+ A LQG may accumulate hazardous waste on site for 90 days or less without a RCRA permit

Small Quantity Generators

Small quantity generators (SQGs) - defined as those facilities that:

- Generate between 100 kg and 1,000 kg of hazardous waste per month

OR

- Accumulate less than 6,000 kg of hazardous waste at any time

+ A SQG may accumulate hazardous waste on site for 180 days or less

Conditionally Exempt Small Quantity Generators

Conditionally exempt small quantity generators (CESQGs) - defined as those facilities that generate:

- Less than 100 kg of hazardous waste per month

OR

- Less than 1 kg of acutely hazardous waste per month

+ May not accumulate more than 1,000 kg at one time

RCRA solely as a result of conducting cleanup, these RCRA permits are required to address the cleanup of releases from any unit where solid or hazardous wastes have been placed at any time. Pursuant to 3008(h), EPA, may through an administrative or judicial order, also compel cleanup at facilities that have, or should have had interim status, as well as some facilities that had interim status. Many states have similar authority.

Second, cleanups at brownfields that were not previously RCRA facilities can trigger RCRA requirements. In the course of a cleanup, hazardous waste may be generated, treated, stored, or disposed of on site. If this occurs, the property may become subject to RCRA. Applicable RCRA regulations may include the requirement to obtain a permit if certain treatment, storage, or disposal occurs on site. However, if the waste is promptly removed from the site (within 90 days), the remediator could be regulated as a hazardous waste generator, and would not be required to obtain a permit.

Cleanup Responsibilities Under RCRA

The State or Federal agency implementing the RCRA program where a site is located has the authority to compel Corrective Action (CA) at a treatment, storage, or disposal facility (TSDF). Generator-only sites are not subject to RCRA corrective action requirements. However, in certain circumstances, under RCRA §7003, where a condition at a site may present an imminent and substantial endangerment to human health and/or the environment, EPA has the authority to compel present and past owners and operators as well as generators to clean up a site.

HWIR-Media Rule and Brownfields

The recently promulgated Hazardous Remediation Waste Management Requirements (HWIR-Media) Final

Rule makes a number of changes that should address some concerns regarding the application of RCRA to brownfield sites. HWIR-Media encourages cleanup activities, particularly at sites that may not otherwise be subject to CA, such as brownfields, making requirements under RCRA for facilities handling only hazardous remediation wastes more flexible (i.e., those wastes managed as a result of cleaning-up a site). Among other things, the rule provides incentives for brownfield cleanup by no longer mandating facility-wide corrective action at cleanup only sites; reducing permitting requirements to streamline the administrative process; and by creating a new kind of unit called a "staging pile" that allows more flexibility in temporarily storing remediation waste during cleanup activities.

RCRA Brownfields Prevention

In June of 1998, EPA announced its RCRA Brownfields Prevention Initiative which included forming a national workgroup to identify ways, in appropriate situations, to facilitate the cleanup and reuse of previously used property which may have RCRA implications. EPA also plans to select a few regionally sponsored pilots in 2000 to help our goal of protective, expeditious cleanups that allow future reuse of the property.

While the RCRA Brownfields Prevention Initiative will not address large scale regulatory or legislative reform, it will build on the statutory and regulatory flexibility that currently exists. The goals for EPA's RCRA Brownfields Prevention Initiative are

1. To raise awareness by announcing and publicizing our intentions in undertaking this initiative to lenders, developers, community representatives and other stakeholders in brownfields cleanup and reuse.
2. To work with our partners on brownfields reuse to gather information, identify and address RCRA barriers, and develop solutions.

3. To develop tools such as fact sheets and pilot good ideas generated from dialogue with interested stakeholders.

Questions and Answers

Q: What is a RCRA Brownfield?

A: Brownfields are abandoned or underutilized industrial and commercial properties whose potential for redevelopment is complicated by real or perceived environmental contamination irrespective of whether the property is subject to Superfund, RCRA or another statute. RCRA brownfields are simply brownfields that may be or have been subject to RCRA requirements or may have RCRA statutory or regulatory implications.

Q: Does EPA have an established program for RCRA Brownfields?

A: In June of 1998, EPA announced its RCRA Brownfields Prevention Initiative which included forming a national workgroup to identify ways, in appropriate situations, to facilitate the cleanup and reuse of previously used property which may have been subject to RCRA requirements.

Q: How do I find out if a piece of property is regulated under RCRA?

A: You can find out whether a property is currently regulated under RCRA by contacting the state where the property is located or by calling the RCRA hotline at 800/424-9346.

Q: What is the difference between Superfund/CERCLA and RCRA?

A: In operation, RCRA primarily regulates active facilities and is focused on how wastes should be managed to avoid potential threats to human health and the environment although it does have a cleanup (i.e., corrective action) component. CERCLA, on the other hand,

comes into play primarily when a site has been abandoned or mismanagement has occurred (i.e., when there has been a release or a substantial threat of a release in the environment of a hazardous substance or of a pollutant or contaminant that presents an imminent and substantial threat to human health or the environment).

Q: How is a site or facility defined under RCRA?

A: For purposes of corrective action, RCRA defines a facility as all contiguous property under the control of the owner or operator seeking a permit under Subtitle C or subject to an order under § 3008(h) of RCRA.

Q: What activities may subject a person to RCRA corrective action (CA)?

A: Generally, treatment, storage or disposal of waste listed or identified as hazardous under Subtitle C subjects a facility to the corrective action requirements (unless it is a cleanup only site.)

Q: If I clean up my site under CERCLA, do I still have worry about RCRA requirements?

A: A cleanup under CERCLA should be adequate to meet the RCRA cleanup, or corrective action requirements. However, a CERCLA cleanup does not exempt you from RCRA regulations. Site-specific factors need to be evaluated by the implementing agency on a case-by-case basis; consult your State, EPA Regional office or the RCRA hotline.

Q: As a RCRA facility, are there any brownfield incentives that I can take advantage of?

A: At the federal level, EPA is exploring administrative options, within the existing statutory framework, to provide incentives. EPA plans to select a few regionally sponsored pilots in 2000 to help our goal of protective,

expeditious cleanups that allow future reuse of the property. Check with your respective state and/or local governments for incentives offered independently of the federal government.

Q: Will sampling trigger RCRA?

A: No, sampling should not generally trigger RCRA regulations.

Q: Who is responsible for cleanup at a RCRA site?

A: Unlike Superfund, under RCRA generally the current owner/operator of a facility is responsible for cleanup. However, under RCRA §7003 the implementing Agency has the authority to compel past owners and operators as well as generators to clean up a site in certain circumstances.

Q: How do I get more information?

A: Visit EPA's web site at: www.epa.gov/oswer or Call our RCRA hotline: 800/424-9346 or 703/412-9810

For more information on a specific site in your area you should contact your state because RCRA is primarily implemented by the states.

For further information contact:
Tessa Hendrickson - (202) 564-6052
Office of Site Remediation and Enforcement

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Fact Sheet

The Imminent and Substantial Endangerment Provision of Section 7003 of RCRA

United States Environmental Protection Agency
Office of Site Remediation Enforcement
Quick Reference Fact Sheet

Section 7003 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. Section 6973, provides EPA with a broad and effective enforcement tool that can be used to abate imminent and substantial endangerments to health or the environment. Designed for use by EPA staff, this fact sheet helps clarity the meaning of "imminent and substantial endangerment" and describes the usefulness of Section 7003.

Introduction

RCRA Section 7003 allows EPA to address situations where the handling, storage, treatment, transportation, or disposal of any solid or hazardous waste may present an imminent and substantial endangerment to health or the judicial action or issue an administrative order to any person who has conducted or is contributing to such handling, storage, treatment, transportation, or disposal to require the person to refrain from those activities or to take any necessary action.

Section 7003(a) is very similar to the imminent and substantial endangerment provision contained in CERCLA Section 106(a) of the Compensation, Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. Section 9606(a). In addition, it allows EPA to require some actions that can also be required under the corrective action provision set forth in Section 3008(h) of RCRA, 42 U.S.C. Section 6928(h). However, RCRA Section 7003 provides EPA with a very valuable enforcement tool by allowing EPA to address several types of situations that are beyond the scope of CERCLA Section 106(a) and RCRA Section

3008(h).

The Meaning of "Imminent and Substantial Endangerment"

Despite the dramatic sound of the term "imminent and substantial endangerment," it is not very difficult to meet the endangerment standard set forth in RCRA Section 7003. The "imminent and substantial endangerment" language and standard contained in CERCLA Section 106(a) and RCRA are very similar to the language and in Section 106(a) and RCRA Section 7002, 42 U.S.C. Section 6972, the RCRA citizen suit provided provisions which allows any person to commence a civil action to seek abatement of an imminent and substantial endangerment to heal or the environment. Thus far, the courts have not distinguished between the endangerment standards of these three provisions. The following principles have emerged from courts interpreting RCRA and CERCLA's imminent and substantial endangerment provisions:

- An "endangerment" is an actual, threatened, or potential harm to health or the environment.[l] As underscored by Congress use of the words "may present" in the endangerment standard of § 7003, neither certainty nor proof of actual harm is required.[2] Moreover, neither a release nor threatened release is required.[3] Endangerment to the environment does not require a risk to living organisms. Thus, a risk to groundwater in a populated area is sufficient even if the conditions may no present an endangerment to humans or other life forms.[4]
- An endangerment can be "imminent" if the present conditions indicate that there may be a future risk to health or the environment,[5] even though the harm may not be realized for years.[6] It is not necessary for the harm to be immediate.[7]
- An endangerment can be "substantial" if there is reasonable cause for concern that health or the environment may be at risk.[8] It is not necessary that the risk be quantified.[9]

Factors to consider when determining if conditions may present an imminent and substantial endangerment under RCRA Section 7003

include (1) the levels of contaminants in various media, (2) the existence of a connection between the solid or hazardous waste and air, soil, groundwater, or surface water, (3) the pathway of exposure from the solid or hazardous waste to the population at risk, (4) the sensitivity of the population, (5) bioaccumulation in living organisms, and (6) visual signs of stress on vegetation.[10] It is important to note, however, that in any given case, one or two factors may be so predominant as to be determinative of the issue.[11]

The following are some examples of situations where courts have determined that imminent and substantial endangerments have existed under RCRA:

- At a shooting range where lead from lead shot had accumulated in the tissues of nearby waterfowl and shellfish.[12]
- At a facility where oily waste containing hazardous constituents had leaked from tanks into surrounding soils.[13] EPA had determined that there was a potential for off-site migration of the contaminants through a drainage ditch leading toward a nearby river.[14] EPA also documented the death of several migratory birds and introduced evidence from the U.S. Fish and Wildlife Service indicating that there was a continuing threat to migratory birds.[15]
- At a municipal landfill that had leaked at least 10% of its leachate containing low levels of lead into an adjacent wetland.[16] Lead levels in test wells surrounding the landfill were generally below the maximum contaminant levels (MCLs) for drinking water,[17] and no actual harm was shown to the wetland.[18] However, an expert testified that cattails in the wetland would not show actual harm until they had been exposed to contamination for an extended period of time.[19]
- At a shopping center where dry cleaning solvents discharged from dry cleaning facilities had contaminated groundwater in a populated area.[20] Contaminant levels in the migrating plume exceeded MCLs.[21] Although some area wells had been closed at least in part because of the contaminated plume, the court found that the conditions may have presented an imminent and substantial endangerment to the environment, but not

necessarily to human health.[22]

The Usefulness of Section 7003

Section 7003 provides broad enforcement authority that can be used against a variety of parties to address endangerments resulting from various types of materials and to require a wide variety of abatement actions. Section 7003 is especially valuable because it allows EPA to address certain situations which cannot be addressed under either CERCLA Section 106(a) or RCRA Section 3008(h).

Two examples of the general usefulness of Section 7003 are the following:

- Under § 7003, "any person" includes any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility. EPA can therefore initiate actions under Section 7003 against parties including those falling into any of the four categories of potentially responsible parties (PRPs) under CERCLA.
- Section 7003 allows EPA to require the respondent or defendant to cease any activities contributing to the endangerment and/or take any necessary action. Possible abatement actions include investigations and studies, interim measures, comprehensive corrective action, controls on future operations, and discontinuance of operations.

Under CERCLA Section 106(a), EPA may initiate a judicial action or issue an administrative order to a PRP when there may be an imminent and substantial endangerment because of an actual or threatened release of a "hazardous substance". Advantages of RCRA Section 7003 over CERCLASection 106(a) include the following:

- Section 7003 can be used to issue administrative orders to any federal department or agency in an expeditious manner. Section 6001(a) of RCRA, 42 U.S.C. Section 6961 (a), contains an express waiver of sovereign immunity that allows administrative orders and civil and administrative penalties and fines to be issued and assessed against any federal department or agency.

Section 6001(b) of RCRA, 42 U.S.C. Section 6961(b), expressly grants the Administrator the authority to issue an administrative order to another federal department or agency pursuant to RCRA's enforcement authorities, including Section 7003. Although RCRA Section 6001provides that an administrative order issued to federal department or agency does not become final until the department or agency has had the opportunity to confer with the Administrator, concurrence from the Department of Justice (DOJ) is not required for orders issued under RCRA Section 7003. In contrast, Executive Order 12580 on Superfund Implementation (January 23,1987) requires EPA to obtain DOJ concurrence before issuing an order to federal department or agency under CERCLA Section 106(a). RCRA Section 7003 therefore allows for more expeditious issuance of orders to federal departments and agencies.

- Section 7003 can be used to address endangerments caused by waste which is "solid waste" as defined in Section 1004(27) of RCRA, 42 U.S.C. Section 6903(27), but which is not "hazardous waste" as defined in Section 1004(5) of RCRA, 42 U.S.C.Section 6903(5), or in the regulations promulgated pursuant to Section 3001 of RCRA 42 U.S.C.Section 6921. The definition of "hazardous substance" in Section 101(14) of CERCLA, 42 U.S.C.Section 9601(14), includes "hazardous waste" having characteristics identified under or listed pursuant to Section 3001 of RCRA. CERCLA's definition of "hazardous substance" does not include materials that qualify as "solid waste" under RCRA Section 1004(27), although it does encompass some materials, such as radionuclides, which are not "solid waste" and therefore cannot be addressed under RCRA Section 7003. Nevertheless, RCRA Section 7003 can be used to address a significant category of materials, "solid waste" under Section 1004(27), that cannot be addressed under CERCLA Section 106(a).
- Section 7003 can be used to address endangerments caused by "hazardous waste" that meets the broad definition of that term under Section 1004(5) of RCRA, but which does not meet the more narrow definitions of "hazardous waste" promulgated in 40 C.F.R. Part 261 pursuant to RCRA Section 3001. As noted above, CERCLA's definition of "hazardous substance" includes "hazardous waste" having characteristics identified under

or listed pursuant to RCRA Section 3001. The CERCLA definition of "hazardous substance" does not include all materials that qualify as "hazardous waste" as defined in RCRA Section 1004(5). Section 7003 can therefore be used to address some hazardous wastes that are beyond the scope of CERCLA Section 106(a).

- Section 7003 can be used to address endangerments caused by petroleum. Petroleum is excluded from the definition of "hazardous substance" in CERCLA Section 101(14). Petroleum is not excluded from the definitions of "solid waste" under RCRA Section 1004(27) or "hazardous waste" under RCRA Section 1004(5). RCRA Section 7003 can therefore be used to address a significant category of materials B petroleum and petroleum products B that cannot be addressed under CERCLA Section 106(a).

RCRA Section 3008(h) allows EPA to require corrective action to address the release of hazardous waste or hazardous constituents at any treatment, storage, or disposal facility authorized to operate under interim status pursuant to Section 3005(e) of RCRA, 42 U.S.C. Section 6925(e).

EPA interprets the term "authorized to operate" to include facilities currently operating under interim status, as well as those that lost interim status or should have obtained interim status but failed to do so. RCRA § 3008(h) does not require a finding of imminent and substantial endangerment. Nevertheless, advantages of RCRA Section 7003 over RCRA Section 3008(h) include the following:

- Section 7003 can be used to address endangerments caused by "solid waste" that meets the definition of that term under Section 1004(27) of RCRA, but which does not meet the definition of "hazardous waste" under RCRA Section 1004(5). At least one court has held that RCRA Section 3008(h) applies to the release of hazardous constituents listed by EPA in Appendix VII I of 40 C.F.R. Part 261 and not merely to the release of "hazardous waste" as stated in RCRA Section 3008(h).[23] Nevertheless, RCRA § 3008(h) does not appear to apply to the release of merely "solid waste" that is not a hazardous waste or a hazardous constituent. RCRA Section 7003 can therefore be used to address a significant

category of materials, "solid waste" under Section 1004(27), that cannot be addressed under RCRA Section 3008(h).

- Section 7003 can be used to address spills of solid or hazardous waste by generators at facilities that are not authorized (and not required to be authorized) for interim status under RCRA Section 3008(h). RCRA Section 3008(h) applies only to releases from treatment, storage, or disposal facilities that have, had, or should have had interim status. Section 7003 can therefore be used to address releases and other endangerments at a large category of facilities that are beyond the scope of Section 3008(h): facilities at which solid or hazardous waste is generated but which neither have, had, nor were required to have, interim status.

[1] See, e.g., Dague v. City of Burlington, 935 F.2d 1349,1356 (2d Cir. 1991).

[2] Id.

[3] United States v. Aceto Agricultural Chemicals Corp., 872 F.2d 1373, 1382 (8th Cir. 1989).

[4] See, e.g., Lincoln Properties. Ltd. v. Higgins, 23. Envtl. L. Rep. (Envtl. L. Inst.) 20665, 20671-672 (E.D. Cal. 1993)

[5] See, e.g., Dague, 935 F.2d at 1356.

[6] See, e.g., United States v. Conservation Chemical Co., 619 F. Supp. at 194 (W.D. Mo. 1985).

[7] Dague, 935 F.2d at 1356.

[8] See, e.g., Conservation Chemical Co., 619 F. Supp. at 194.

[9] Id.

[10] See, e.g., Dague v. City of Burlington, 732 F. Supp. 458 (D.Vt. 1989).

[11] Conservation chemical Co., 619 F. Supp. at 194.

[12] Connecticut Coastal Fishermen's Association v. Remington Arms Co., Inc., 989 F.2d 1305, 1317 (2d Cir. 1993).

[13] United States v. Valentine, 856 F. Supp. 621, 625 (D. Wyo. 1994).

[14] Id. at 624.

[15] Id. at 624-625.

[16] Dague, 935 F.2d at 1356.

[17] Dague, 732 F. Supp. at 463.

[18] Id. at 469.

[19] Id. at 468.

[20] Lincoln Properties, 23 Envtl. L. Rep. at 20671-672.

[21] Id. at 20671.

[22] Id. at 20672.

[23] United States v. Clow Water Systems, 701 F. Supp. 1345, 1356 (S.D. Ohio 1988).

For further information contact:
The Office of Site Remediation Enforcement, in conjunction with the Office of Regulatory Enforcement, is currently developing a guidance document to supersede EPA's 1984 guidance on the use and issuance of administrative orders under RCRA Section 7003. The 1984 guidance will remain in effect until the new guidance is issued.

If you have questions about this fact sheet or the project to develop new § 7003 guidance, please contact EPA's Office of Site Remediation Enforcement at (202) 564-5100.

RCRA CLEANUP REFORMS

Faster, Focused, More Flexible Cleanups

United States Environmental Protection Agency
Solid Waste and Emergency Response (5305W)
EPA530-F-99-018
Office of Solid Waste
July 1999

The U.S. Environmental Protection Agency (EPA) is implementing a set of administrative reforms, known as the RCRA Cleanup Reforms, to the Resource Conservation and Recovery Act (RCRA) Corrective Action program. The reforms are designed to achieve faster, more efficient cleanups at RCRA sites that treat, store, or dispose of hazardous waste and have potential environmental contamination. Although these reforms will emphasize flexibility and trying new approaches to clean up these facilities, EPA and the states will continue to ensure protection of human health and the environment.

Why Is EPA Doing the RCRA Cleanup Reforms?

When the RCRA law and regulations governing proper hazardous waste management went into effect around 1980, thousands of facilities became newly subject to these federal regulations. This RCRA regulatory structure has helped ensure that hazardous waste generated from ongoing industrial operations is properly managed and does not contribute to a future generation of toxic waste sites. However, many of these facilities had existing soil and groundwater contamination resulting from historical waste

National Cleanup Goals (Number of Facilities with Cleanup Measures Verified per Year)

Year	Current Human Exposures Controlled	Groundwater Contamination Controlled
1999	172	84
172	172	172
2001	172	172
2002	172	172
2003	257	172
2004	257	172
2005	*255*	172
Total By 2005	1629* (95%)	1200* (70%)

*Includes facilities verified prior to 1999

management practices. The RCRA Corrective Action program addresses cleanup of existing contamination at these operating industrial facilities.

Congress, the general public, EPA, and state agencies all believe the pace and progress of RCRA cleanups must be increased. In reviewing the program, EPA and other stakeholders identified several factors that were impeding timely and cost-effective RCRA cleanups. In some instances, RCRA cleanups have suffered from an emphasis on process steps and a lack of clarity in cleanup objectives. An additional complication is that the application of certain RCRA requirements, such as the land disposal restrictions (LDR), minimum technological requirements, and permitting, can create impediments to cleanup.

What Are the RCRA Cleanup Reforms?

The RCRA Cleanup Reforms are EPA's comprehensive effort to address the key impediments to cleanups, maximize program flexibility, and spur progress toward a set of ambitious national cleanup goals. The national cleanup goals focus on 1,712 RCRA facilities identified by EPA and the states warranting attention over the next several years because of the potential for unacceptable exposure to pollutants and/or for groundwater contamination. The goals, set by EPA under the Government Performance and Results Act (GPRA), are that by 2005, the states and EPA will verify and document that 95 percent of these 1,712 RCRA facilities will have "current human exposures under control," and 70 percent of these facilities will have "migration of contaminated groundwater under control." To ensure that these ambitious goals are achieved, the RCRA Cleanup Reforms outline aggressive national cleanup goals for each of the next several years. Implementation of the proposed reforms will help us achieve the national RCRA cleanup goals. Specifically, the RCRA Cleanup Reforms will:

- Provide new results-oriented cleanup guidance with clear objectives.
- Foster maximum use of program flexibility and practical approaches through training, outreach, and new uses of enforcement tools.
- Enhance community involvement including greater public access to information on cleanup progress.

These reforms are described in more detail at the end of this fact sheet. The reform efforts are intended to build on actions taken by EPA and the states in recent years to accelerate cleanups, such as:

- The May 1, 1996, Advance Notice of Proposed Rulemaking (ANPR, 61 FR 19432) which contains the Agency's latest guidance for the corrective action program and identifies a number of flexible cleanup approaches.
- Recent promulgation of the the Hazardous Remediation Waste Management Requirements ("HWIR-Media," 63 FR 65874, November 30, 1998) which, among other things, create streamlined RCRA permits for cleanup wastes, release "cleanup only" facilities from requirement to conduct facility-wide corrective action, and allow for temporary "staging piles" that have flexible design and operating requirements.
- Recent promulgation of the Post-Closure Regulation (63 FR 56710, October 22, 1998) which provides flexibility to EPA and authorized states by removing the requirement that interim status facilities obtain a permit for the post-closure care of a waste management unit when other enforcement documents are used, and harmonizing the sometimes duplicative closure and corrective action requirements.
- The Land Disposal Restrictions Standards for Contaminated Soils (63 FR 28617, May 26, 1998) which better tailor RCRA's LDRs to contaminated soils managed during cleanups.

How Will the Success of the Reforms Be Measured?

While the ultimate goal of RCRA Corrective Action is to achieve completed cleanups, we will measure the near-term success of the program and reforms against the GPRA goals and annual cleanup targets for verifying that current human exposures are under control and migration of contaminated groundwater

is under control (see table on preceding page). Measuring and recording our progress toward these goals will be a top priority for EPA and the states over the next several years.

How Will EPA Involve Stakeholders In the Reforms?

We will provide periodic updates on the RCRA Cleanup Reforms and solicit input from stakeholders through several means including focus meetings, *Federal Register* notices, the new RCRA Corrective Action newsletter, Internet postings, and press releases. EPA seeks continuous feedback from all stakeholders on the need for additional reforms beyond those already underway. While the Agency values and appreciates the feedback and interest of all stakeholders, limited resources will not allow us to respond individually to those who provide input on the RCRA Cleanup Reforms. All input will be seriously considered by EPA, however. Based on stakeholder input and our ongoing assessment of the program, we will continue to refine the RCRA Cleanup Reforms, add reforms as needed, and communicate program changes including those resulting from stakeholder input.

For further information contact:
the RCRA Hotline at 800-424-9346. You may also e-mail your questions via our Web site at http://www.epa.gov/epaoswer/hotline/index.htm.
If you would like to provide written feedback on the Reforms, please mail them to the RCRA Information Center (5305W), USEPA, 401 M St., SW, Washington, DC 20460 or, e-mail to rcra-docket@epa.gov. Please include the following number on all correspondence, written or e-mailed, to the RCRA Information Center: F-1999-CURA-FFFFF.

The RCRA Corrective Action program is run jointly by EPA and the states, with 33 states and territories authorized to implement the program. Corrective action is conducted under RCRA permits, orders and other approaches.

RCRA Cleanup Reforms

EPA is Implementing the following reforms to help streamline RCRA cleanups and meet the national cleanup goals

I. Provide new results-oriented cleanup guidance with clear objectives

EPA will issue a *Federal Register* notice concerning the operating guidance for the corrective action program. EPA also will issue several guidance documents to emphasize use of flexibility in the corrective action process, consistent measures for determining when a site has met corrective action goals, and to provide a more consistent basis for groundwater use decisions.

a. Notice Concerning 1990 Subparr S Proposal

In an upcoming *Federal Register* notice, EPA plans to announce its intention not to take final action on most of the provisions of the July 27, 1990, proposed Subpart S rule. Provisions of Subpart S which have been finalized (e.g., Corrective Action Management Units) will remain in effect. This notice is intended to eliminate uncertainty for states and owner/operators created by the potential promulgation of detailed federal regulations, thereby clearing the way for implementation of more flexible corrective action approaches. In the notice, EPA plans to clarify that the Agency does not intend to finalize a process-oriented corrective action approach, and to confirm that the 1996 Advanced Notice of Proposed Rulemaking remains the primary corrective action program guidance.

b. Corrective Action Guidance

1. Environmental Indicators Guidance and Implementation

The two corrective action Environmental Indicators-*Current Human Exposures under Control* and *Migration of Contaminated Groundwater under Control*-are measures of program progress and are being used to meet the goals set under the Government Performance and Results Act. This guidance, issued in February 1999, describes how to determine if these measures have been met.

These Environmental Indicators are designed to aid site decision makers by clearly showing where risk reduction is necessary, thereby helping regulators and

facility owner/operators reach agreement earlier on stabilization measures or cleanup remedies that must be implemented. Focusing on the Environmental Indicators should also help reduce delays in the review of cleanup work plans and allow owner/operators and regulators to concentrate on those problems that potentially pose significant risks.

2. Results-Based Approaches for RCRA Corrective Action

   This guidance will stress that results-based approaches which emphasize outcomes and eliminate unnecessary process steps, should be a significant part of state/regional corrective action programs in order to meet the GPRA goals and to move facilities toward the longer-term goal of final facility cleanup. Results-based approaches include setting cleanup goals, providing procedural flexibility in how goals are met, inviting innovative technical approaches, focusing data collection, and letting owner/operators undertake cleanup action with reduced Agency oversight, where appropriate. Under such approaches, owner/operators focus on environmental results and the most technologically efficient means of achieving them while still being held fully accountable.

3. Corrective Action Completion Guidance

   This guidance will discuss how to document completion of corrective action at facilities. It will address: termination of permits and interim status where corrective action is complete; how to determine that corrective action is complete at part of a facility; and the importance of public involvement in corrective action. This guidance will provide for a more predictable completion process and provide facility owner/operators with reasonable assurance that regulatory activities can be completed at their facility.

4. The Role of Groundwater Use in RCRA Corrective Action

   This guidance is intended to provide more certainty about cleanup objectives and expectations with respect to groundwater remediarion. It will include recommendations on how to account for current and reasonably expected uses of groundwater when imple-menting interim and final RCRA corrective action remedies.

II. Foster Maximum Use of Program Flexibility and Practical Approaches throughTraining, Outreach, And New Uses of Enforcement Tools

Through outreach and training, EPA will encourage maximum appropriate use of the existing flexibility in the corrective action program and prompt implementation of recent rules offering regulatory flexibility.

a. Prompt Implementation of the HWIR-Media and Post-Closure Rules

EPA will strongly encourage states to expeditiously incorporate the Hazardous Remediation Waste Management Requirements (HWIR-Media) and Post-Closure regulations into their programs. As more states adopt and implement the flexibility in the HWIR Media rule, Post Closure rule, and the alternative soil treatment standards promulgated under LDR Phase IV, impediments to cleanup will be reduced. This is because these rules limit the applicability in certain cleanup situations of some RCRA requirements such as land disposal restrictions, minimum technological requirements, and permitting, or provide alternative requirements more tailored to cleanup situations.

b. Maximize Practical Approaches and Use All Appropriate Authorities to Expedite Cleanup

The national EPA program office will reach out to the EPA regions, states, and external stakeholders to emphasize the importance of environmental results in the corrective action program. EPA will place a priority on authorizing additional states to implement corrective action or enhancing work sharing arrangements with states that are not authorized for the program. With the RCRA Cleanup Reforms we hope to develop a new atmosphere of partnership and cooperation among regulatory authorities, industry, and stakeholders

We will encourage regulators to use a broad spectrum of approaches to expedite corrective action and achieve GPRA goals. These approaches include new uses of enforcement tools to create incentives for cleanup at facilities with cooperative owners as well as to compel cleanups at facilities where collaborative approaches have not yielded results.

c. Provide Comprehensive Training on Successful Cleanup Approaches

EPA has launched a comprehensive training effort on Results-Based Corrective Action, which features a three-day workshop offered to EPA Regions and states in 1999 and 2000. An Internet version of this training is also being developed for release. The training will emphasize to corrective action regulators the flexibility in existing policies and regulations. EPA and State regulators will learn from their peers about innovative, successful approaches that are speeding cleanups now at corrective action sites. The training emphasizes using a Conceptual Site Model and Environmental Indicators to help focus corrective action activity at sites. This comprehensive training effort will help EPA and State regulators make maximum use of the flexibility inherent in the corrective action program and to adopt more streamlined approaches for accelerating cleanups.

III. **Enhance Community Involvement Including, Greater Public Access to Information on Cleanup Progress**

a. Emphasize Public Involvement in RCRA Cleanups

Some of the clear benefits of meaningful public involvement include: letting the public know from the onset that their opinions are valued and can influence decision making; learning from the public about past environmental problems associated with the facility; gaining an understanding of current as well as future land use plans; and avoiding delays which can arise late in the remedy selection process when the public has not been adequately engaged.

EPA will continue to emphasize the importance of meaningful public involvement throughout RCRA cleanups. EPA's commitment to meaningful public involvement was described in the 1996 Advance Notice of Proposed Rulemaking and is part of the central theme of effective communication that is interwoven throughout the corrective action training effort. In addition, public involvement is the focus of the RCRA Public Participation Training which is now under development and will be offered to regions and states. EPA will also convene workshops with stakeholders later this year. Through these workshops we hope to better

understand the public's concerns as well as gather suggestions for further improvements to the corrective action program.

b. Provide Detailed Information on Cleanup Progress

EPA will post information on cleanup progress for individual facilities on the Internet. With this information, we hope to generate greater public interest and awareness in corrective action at individual facilities, thereby enhancing the ability of the community to become more involved in decisions about the cleanup. This information will allow stakeholders to monitor progress at facilities in their area as well as overall progress in the corrective action program. Information is available at: www.epa.gov/epaoswer/osw/cleanup.htm.

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Fact Sheet

RCRA CLEANUP REFORMS

Reforms II: Fostering Creative Solutions

United States Environmental Protection Agency
Solid Waste and Emergency Response (5305W)
EPA530-F-01-001
Office of Solid Waste
January 2001
www.epa.gov/osw

The U.S. Environmental Protection Agency (EPA) is implementing a second set of administrative reforms to accelerate the cleanup of hazardous waste facilities regulated under the Resource Conservation and Recovery Act (RCRA). EPA's 1999 Reforms promoted faster, focused, more flexible cleanups. The 2001 Reforms reinforce and build upon the 1999 Reforms and will pilot innovative approaches, accelerate changes in culture, connect communities to cleanup, and capitalize on redevelopment potential, while maintaining protection of human health and the environment.

Why Is EPA Reforming the RCRA Corrective Action Program?

The goals for the RCRA Corrective Action program remain very challenging. To more effectively meet these goals and speed up the pace of cleanups, EPA introduced RCRA Cleanup Reforms in 1999 and is implementing additional Reforms in 2001. The 1999 and 2001 Reforms build upon actions taken by EPA and the states in recent years to accelerate cleanups.

EPA believes that the 1999 Reforms remain central to successful implementation of the program. The 1999 Reforms were designed to:

- Focus the program more effectively on achievement of environmental results, rather than fulfillment of unnecessary steps in a bureaucratic process;
- Foster maximum use of program flexibility and practical approaches to achieve program goals;
- Enhance public access to cleanup information and improve opportunity for public involvement in the cleanup process.

The 1999 Reforms set the near-term focus of the program on attainment of the two Environmental Indicators and established an environment for program implementors to be innovative and results-oriented. The 1999 Reforms have successfully led the program toward *faster, focused, more flexible cleanups*. An example of progress since 1997 is the increase in the number of RCRA cleanup facilities meeting both Environmental Indicatorse, (from 47 to 504).

In 2000, EPA held a series of meetings with program implementors and stakeholders, including representatives from tribes, federal and state agencies, regulated industry, and environmental and community groups, to discuss program impediments, successful approaches and ideas for 2001 Cleanup Reforms. Central ideas that emerged include the importance of: (1) reinforcing and building upon the 1999 Reforms; (2) empowering program implementors to try new approaches at the site level; and (3) using frequent, informal communication throughout the cleanup process.

What Are the Goals of the RCRA Corrective Action Program?

EPA has established two near-term goals, termed "Environmental Indicators," for the RCRA Corrective Action program. These goals, developed under the Government Performance and Results Act (GPRA), are that by 2005, the states and EPA will verify and document that 95 percent of the 1,714 RCRA cleanup facilities under GPRA focus will have "current human exposures under control," and 70 percent of these facilities will have "migration of contaminated groundwater under control." The long-term goal of the program is to achieve final cleanup at all RCRA corrective action facilities.

What Are the RCRA Cleanup Reforms of 2001?

The RCRA Cleanup Reforms of 2001 highlight those activities that EPA believes would best accelerate program progress and foster creative solutions. The 2001 Reforms reflect the ideas EPA heard from program implementors and stakeholders and introduce new initiatives to reinforce and build upon the 1999 Reforms. Specifically, the 2001 Reforms will:

- Pilot innovative approaches;
- Accelerate changes in culture;
- Connect communities to cleanups;
- Capitalize on redevelopment potential.

The 2001 Reforms include just some of the innovative approaches that have been identified by program implementors and stakeholders. EPA intends to continue work in other areas critical to meeting program goals. In particular, we seek to: continue a dialogue with interested parties on groundwater cleanup and other issues relating to final cleanup; provide guidance tailored to cleanup at facilities with limited resources to pay for cleanup; and, continue to work with federally-owned facilities to help them meet their Environmental Indicator goals. Similarly, we encourage program implementors and stakeholders to use approaches that improve the program yet are not specifically included in the RCRA Cleanup Reforms.

I. Pilot innovative approaches.

The RCRA Cleanup Reforms Pilot Program will support state and EPA Regional Offices in their efforts to use innovative, results-orientated and protective approaches to speed achievement of Environmental Indicator goals and final cleanup. Stakeholders are encouraged to contact state and EPA Regional Offices with their pilot ideas. EPA has set a target of 25 pilot projects to be launched in 2001. EPA expects at least one pilot project in each EPA Region, administered by the state or EPA. EPA will showcase pilot projects to share

successes and lessons learned and to promote use of similar approaches at other facilities. EPA recommends that stakeholders consider pilot projects in one or more areas. Examples include pilots that:

- Achieve program goals most effectively at companies with multiple facilities;
- Improve stakeholder involvement and communication to resolve issues where cleanup progress is slow;
- Use site characterization technologies or strategies that efficiently assess Environmental Indicators;
- Enhance the use of protective and accountable state non-RCRA Cleanup programs to achieve program goals;
- Establish EPA Regional or state "corrective action expediters" to focus on cleanups that are stalled or delayed;
- Expedite achievement of program goals at federally-owned facilities;
- Use Superfund or emergency authorities at RCRA sites for bankrupt or unwilling facilities.

II. Accelerate changes in culture.

EPA will help program implementors and stakeholders accelerate changes in the culture in which they imple-

What is the RCRA Corrective Action Program?

In 1980, when the RCRA law and regulations went into effect, thousands of facilities became subject to hazardous waste management regulations. These regulations helped ensure that hazardous waste generated from ongoing industrial operations is properly managed and does not contribute to a future generation of toxic waste sites. However, many of these facilities had soil and groundwater contamination resulting from their waste management practices prior to 1980. The RCRA Corrective Action program addresses cleanup of past and present contamination at these operating industrial facilities.

Who Runs the RCRA Corrective Action Program?

The RCRA Corrective Action program is run by both EPA and the states, with 38 states and territories authorized to implement the program. Corrective action is conducted under RCRA permits, orders and other approaches.

ment the program by: focusing on results over process; encouraging frequent, informal communication among stakeholders; encouraging partnerships in training; promoting methods of information exchange; and, using new approaches to meet Environmental Indicator and long-term cleanup goals. EPA will:

- *Promote nationwide dialogue among program implementors and stakeholders on RCRA cleanups.* EPA Regional Offices will work with states in an effort to hold at least one meeting in 2001 in each EPA Region, open to all stakeholders who wish to interact, provide input, or learn more about the RCRA Corrective Action program. Discussion topics could cover local, regional or national topics relevant to corrective action.
- *Conduct targeted training in partnership with program implementors and stakeholders.* EPA will work with interested parties to deliver targeted training, depending upon the needs of those requesting the training and available resources. Training topics could cover, for example: innovative technical and administrative approaches to cleanup; success stories and lessons learned from implementation of the 1999 Cleanup Reforms; Corrective Action program basics; and use

Focus on Results

The RCRA Cleanup Reforms foster creative, practical, results-based approaches to corrective action. In the field, this means:

- *Providing tailored oversight.* Eliminate administrative or technical steps where not needed to assure effective performance.
- *Using holistic approaches.* Evaluate facilities for overall risk and apply appropriate facility-wide corrective action measures.
- *Exercising procedural flexibility.* Emphasize results over mechanistic process steps and eliminate unproductive activities.
- *Setting performance standards,* Establish clear protective standards the owner/operator must fulfill to complete corrective action.
- *Targeting data collection.* Examine actual conditions at each facility to design data requirements as needed to support corrective action decisions.

of performance-based approaches to corrective action.

- *Use web-based communication to share successes and lessons learned and promote innovative approaches.* EPA will support the establishment of a web-based interactive tool to promote sharing of successes and lessons learned and to provide for frequent exchange of ideas among all stakeholders on any corrective action topic, including those that are technical, policy-oriented or site-specific.
- *Overcome barriers to achieving Environmental Indicators.* EPA will clarify the relationship between Environmental Indicators and final cleanups and how Environmental Indicators can be met within the context of existing orders and permits. EPA will answer "Frequently Asked Questions" about Environmental Indicators, and issue technical guidance on ways to assess the impacts of contaminated groundwater on surface water and indoor air quality. In addition, EPA will demonstrate new uses of enforcement tools to achieve Environmental Indicators.

III. Connect communities to cleanups.

EPA will provide the public with more effective access to cleanup information. EPA seeks to increase public interest in and awareness of cleanup activities, and to further enhance the public's ability to become more involved in decisions about cleanups in communities. EPA will:

- *Clarify principles and expectations for public involvement in corrective action cleanups.* EPA will set out general principles and expectations for providing the public with the opportunity to become involved at corrective action sites. EPA also will share examples of successful public involvement approaches that have been used at RCRA cleanup sites and lessons learned.
- *Increase support of Technical Outreach Services for Communities (TOSC).* The TOSC program provides communities with technical and educational assistance from universities on issues associated with cleanup of hazardous sites. EPA will provide resources to the TOSC program for community involvement at RCRA cleanup sites and advertise the availability of this program.
- *Place Environmental Indicator evaluation forms and cleanup summaries on EPA web sites.*

EPA will place Environmental Indicator evaluation forms and summaries of cleanup activities of 1,714 RCRA facilities on the web sites of EPA Regional Offices. The evaluation forms and summaries will provide readily available information on the status of cleanup at these sites.

- *Publicize and promote the use of readily accessible cleanup information sources.* EPA will produce and distribute a pamphlet for the general public that explains how to access RCRA Corrective Action program information and site-specific cleanup information.

IV. Capitalize on redevelopment potential.

EPA encourages program implementors and stakeholders to capitalize on the redevelopment potential of RCRA cleanup sites. Many of these sites are located in areas that are attractive for redevelopment and are poised for community revitalization. These factors can motivate interested parties to pursue an expedited cleanup, sometimes with additional resources. EPA will:

- *Initiate Additional R CRA Brownfields Pilots.* EPA will launch 4-6 additional RCRA Brownfields pilot projects in 2001. These pilots will be designed to showcase the flexibility of RCRA and the use of redevelopment potential to expedite or enhance cleanups. Pilot applicants could be program implementors or stakeholders. Pilot participants also benefit from RCRA brownfields expertise. Limited funding may become available for EPA to conduct public meetings and related activities.
- *Initiate the Targeted Site Effort (TSE) Program to spur cleanup at RCRA sites with significant redevelopment/reuse potential.* EPA will ask each Regional Office to identify two sites for the TSE in 2001. The TSE program will apply to sites that have significant redevelopment/reuse potential, and require a limited amount of extra EPA support to help spur cleanup. The TSE program will provide participants with focused attention and access to RCRA brownfields expertise. Limited funding may be available for EPA to conduct public meetings and related activities.
- *Provide training and outreach to program implementors on using redevelopment potential to meet program goals.* EPA will provide training and outreach to program implementors and stakeholders to promote the environmental and community benefits that

can be gained by integrating brownfields redevelopment opportiunities and RCRA facility cleanups.

- *Promote cleanup and redevelopment with R CRA "Comfort/Status" Letters.* " Comfort/status" letters provide information regarding EPA's intent to exercise its RCRA corrective action response and enforcement authorities at a cleanup site. EPA will issue examples of letters that have been used to spur cleanup and redevelopment at RCRA facilities.

How Will EPA Measure the Results of the Reforms?

Measuring and recording the results of the RCRA Cleanup Reforms is a priority for EPA and the states to ensure continued improvement of the Corrective Action program. EPA will measure progress in putting the reforms into practice. EPA recognizes program implementors are using new approaches that may or may not be highlighted in the Cleanup Reforms, and will measure progress under these approaches as well. While the ultimate goal of the Corrective Action program is to achieve final cleanups, EPA will continue to measure the near-term success of the program against its Environmental Indicator goals for controlling human exposure and migration of contaminated groundwater.

How Will EPA Involve Stakeholders in Implementing the Reforms?

EPA will provide periodic updates on the RCRA Cleanup Reforms and solicit input from stakeholders through several means, including focus meetings, Federal Register notices, the RCRA Corrective Action Newsletter, Internet postings, and press releases.
EPA seeks continuous feedback from all stakeholders on the need for additional reforms beyond those already underway. EPA values and appreciates the feedback and interest of all stakeholders. However, limited resources may not allow us to respond individually. Based on stakeholder input and our ongoing assessment of the program,

we will continue to refine and add to the RCRA Cleanup Reforms, as needed, and will communicate program changes.

If you would like to provide written comments on the RCRA Cleanup Reforms, please mail your comments to:

RCRA Information Center (5305W),U.S. Environmental Protection Agenry, Ariel Rios Building, 1200 Pennsylvania Avenue, NW, Washington, DC, 20460-0002, or send an email to the RCRA docket at rcra-docket@epa.gov. Please include the following number on all correspondence, written or e-mailed, to the RCRA Information Center: F-2001-CRII-FFFFF.

For further information on corrective action cleanups, please visit state and EPA Regional web sites, which can be linked via the EPA corrective action web site at http://www.epa.gov/correctiveaction. The EPA corrective action web site has the latest and more detailed information on the RCRA Cleanup Reforms.

If you have questions regarding the RCRA Cleanup Reforms, please call the RCRA Hotline at 800-424-9346 or TDD 800-553-7672, or visit their web site at http://www.epa.gov/epaoswer/hotline/index.htm.

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Environmental Fact Sheet

TREATMENT STANDARDS SET FOR TOXICITY CHARACTERISTIC (TC) METAL WASTES, MINERAL PROCESSING WASTES, AND CONTAMINATED SOIL

United States Environmental Protection Agency
Solid Waste and Emergency Response (5305W)
EPA530-F-98-010
Office of Solid Waste
April 1998
www.epa.gov/osw

The Environmental Protection Agency (EPA) is publishing regulatory controls that encourage the safe recycling and disposal of hazardous metal waste and newly identified waste from mineral processing.

Background

The widespread practice of disposing of hazardous waste in units located directly on the land has been regulated by EPA's Land Disposal Restrictions (LDR) program for many years. A major part of the LDR program is to adequately protect public health and safety by establishing treatment standards for hazardous wastes before they can be disposed of in land disposal units. These treatment standards either specify that the waste be treated by a specified technology, or that they be treated by any technology as long as the concentration of hazardous constituents is below a certain level. Universal Treatment Standards specify the concentration levels for hazardous constituents. In addition to setting new treatment standards, another continuing task of the EPA is to better define which industrial materials are wastes, thus subject to regulation, and which should be excluded from regulation.

Action

LDR treatment standards are established for metal-bearing